Case No: HQ10D01840; HQ10X02451

Neutral Citation Number: [2010] EWHC 2829 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 6 October 2010

BEFORE:

MR JUSTICE EADY

BETWEEN:

ROSELANE DRIZA

Claimant/Respondent

- and -

MGN LIMITED

Defendant/Appellant

MS R DRIZA appeared in person

MR D HIRST (instructed by Foot Anstey) appeared on behalf of the Defendant

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Approved Judgment

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1. MR JUSTICE EADY: There are two cases before the court today. One is a libel claim begun by the issue of a claim form on 17 May 2010 and the other a privacy claim begun on 10 June 2010. Both are brought by Ms Roselane Driza who came to notoriety some years ago as having been employed as a cleaner by two immigration judges and she was charged with theft and blackmail. She was, as I understand it, charged with blackmailing the female immigration judge and with stealing compromising video tapes from the male immigration judge. She was convicted in 2006 but those convictions were overturned in July 2007. That is purely by way of background.

2. Meanwhile, she had spent at least part of her sentence in Holloway Prison. What she now complains of is of the publication of in one case an article and in the other case a photograph (only) taken while she was in prison and published in the Sunday Mirror, which is represented today before me by Mr David Hirst. One of his applications was to consolidate the privacy and libel claims but logically I should first address his application to set aside judgment in default entered on 20 June this year. The arguments on the merits are closely linked to his other applications which are to strike out both the libel action and the privacy claim and/or to seek summary judgment on the basis that they are unsustainable for various reasons. I will address the libel claim first.

3. The Particulars of Claim to which I have already referred make it clear that Ms Driza's claim is in respect of an article published on 1 October 2006 with the heading, "Mrs Mop judges beyond the pale". It was written apparently by Carole Malone. She says that the article is totally defamatory and untrue and she refers in particular to an allegation that she was a scrubber in every sense of the word and that she was a Brazilian cleaner-cum-slapper. She also makes reference to the fact that the article accuses her of deciding to get revenge by blackmailing the female judge to the tune of £20,000.

4. She is complaining about the hard copy publication on that date, 1 October 2006, but also alleges that there was publication online until 21 May 2009. So she is complaining in respect of both hard copy and online publication, as she alleges it to have been.

5. A number of criticisms are made of the claim by the Sunday Mirror. It is said first of all that the document does not identify the words complained of or the defamatory meanings relied upon. Technically I suppose that is true. In the ordinary way one should set out, as a pleader, the words complained of whether it be the whole of an article or part of an article in the Particulars of Claim. Furthermore it is customary to plead the defamatory meaning or meanings relied upon. But that is a matter in itself which is capable of cure by amendment no doubt if that were appropriate and due allowance should be made in respect of a litigant in person on matters of that kind.

6. I turn to a more substantive point, which is the submission that the hard copy publication of the newspaper, having taken place on 1 October 2006, is now time-barred. It is well known that the limitation period for libel actions is 12 months and so the relevant period in this case would have expired on 30 September 2007. There is no claim under the Limitation Act for the period to be disapplied for any reason and I cannot in any event see any reason why the period should be disapplied. So that point

is clearly a valid point, as made by the Sunday Mirror in respect of the hard copy publication.

7. I turn therefore to the submissions that have been made in relation to the online publication alleged. As I have already recorded, Ms Driza says that publication continued online until 21 May 2009. If that was so, there would have been four days of publication within the 12 months prior to the issue of the proceedings. There is evidence dealing with this from the solicitor, Mrs Cathryn Smith, on behalf of the defendants. She says that so far as the defendant's website is concerned, this article was not available after a date in January 2008. Insofar as it matters, that was because of rearrangements of the website. If she is right about that, then the limitation period would have expired in respect of online publication also.

8. As to the alleged continuation of publication until 21 May 2009, she draws attention to the fact that the copy in the papers, relied upon by the claimant, appears to have been derived from a different website. My attention was drawn to the URL which makes it clear, or appears to make it clear, that it comes from a website called findarticles.com which is a specialist website which searches and makes available material from newspaper archives. In relation to that, therefore, the submission is made on the defendant's behalf that it would not be responsible for publication deriving from that website, findarticles.com. That would appear also to be correct. Assuming for the moment, however, that the claimant is correct in asserting that the defendant was a publisher up to and including 21 May 2009, she would need to prove that actual publication had occurred during that very brief four day period. It is now well established that mere availability on the Web does not establish publication by any particular defendant. No such evidence has been adduced. It is clear now that there can be no presumption of publication merely from the fact that words were available on a website. So those limitation points appear to me to be sound.

9. I turn, however, to other arguments which were raised. It was argued that the article in question did not appear to be defamatory in any clear sense of the claimant. There was nothing which reflected upon her over and above the fact, which is common ground, that she was in prison at that time as a result of having been convicted of offences in 2006. The article, it is said, added nothing to what was known about her at that time generally. I do not need to decide this point. It seems to me that there are passages in the article which bear *prima facie* defamatory meanings about the claimant, describing her for example as a slapper, a scrubber, an illegal immigrant, Mrs Yo-yo knickers and so on. These allegations are primarily insulting and offensive. They may or may not be defamatory but, if they were properly pleaded, for all I know there could be arguments of justification or fair comment or qualified privilege based on the background material to which I have briefly and obliquely referred.

10. It is unnecessary for me to consider the merits of those arguments because those matters simply do not arise before me today. For good measure Mr Hirst argued that the proceedings were abusive for the reason that a very similar claim had been struck out in the County Court on 8 December 2009. It is said that to bring these further proceedings in the High Court would constitute harassment of the defendant. On that occasion in the County Court the claimant was ordered to pay £1,593.50 by way of costs which largely is outstanding, although I am told that a £100 instalment was paid on the claimant's behalf last week and she explained that her father had helped her with

that. But this again is not a critical argument in the defendant's armoury. I bear in mind that, as appears to have been the case, the learned district judge on that occasion struck out the case in the County Court, either wholly or partly, for the reason that it was an inappropriate forum. The claim, being a claim in libel, should have been brought in the High Court. If the criticism were made of the claimant that she was taking High Court proceedings following the striking out of a County Court claim, purely on the basis that she had finally found the right forum, that would not seem to me to be a very powerful argument. As I have already indicated, the most important arguments for today's purposes in relation to a libel claim are those based on limitation.

11. I now turn to the privacy claim. This is in respect of a photograph which was published of the claimant while she was in jail. She was apparently being escorted by officers within the prison but in a part of the prison grounds visible from outside. The photograph was taken, as I understand it, by someone at a distance while she was walking around the prison grounds. She appears to be turning towards the camera and either laughing or smiling, but what is going on is not entirely clear. It does not really matter for present purposes. The article is headed, "Frocked up - first jail pics of cleaner who blackmailed judges ... and she's got her glad lags on". "Frocked up" is obviously a pun on "locked up" and "glad lags" is a pun on "glad rags". The article contains a reference to the dress that she is wearing in the photograph as having been the same garment, or so it would appear, as one she wore during the course of the trial. But she is not complaining of the article or the accompanying headlines. She is complaining simply, in the privacy claim, of the photograph. She is claiming £40,000 for humiliation and distress.

12. It is well known now, since the House of Lords decisions in Naomi Campbell v MGN Limited [2004] 2AC 457 and in re S (FC) (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593, 603, that when confronted with a claim for the misuse of private information the court should take a two stage approach. First of all it has to be asked whether or not the publication complained of engages the claimant's Article 8 rights, in the sense that it relates to material in respect of which there would be a reasonable expectation of privacy. If the claimant succeeds at that first stage, then it is the court's responsibility to go on to stage 2 and apply what has been described as an "intense focus" to the particular facts of the case to see whether or not, in the particular circumstances, the ultimate balancing exercise between the defendant's Article 10 rights and the claimant's Article 8 rights would yield a particular result. Sometimes an Article 10 right will prevail where there is a *prima facie* reasonable expectation of privacy, for reasons, for example, of public interest. Here, as I understand it, what is said is that the claimant does not really get over the first stage because there is no reasonable expectation of privacy in respect of a photograph of her simply seen walking around the prison grounds. There is nothing intrusive about that. There is nothing which reveals information about her which is not otherwise known. There is nothing, for example, revealed about her state of health by looking emaciated or ill or anything of that kind, and, although it is true to say that she was photographed in a prison environment, it was already widely known by this time that she had been sent to prison as a result of the convictions in 2006. So there was no reasonable expectation of privacy in respect of the mere fact that she was at that time to be found in prison.

13. My attention was drawn in the course of the submissions to the speech in the House of Lords in Campbell v MGN Limited at paragraph 154, of Baroness Hale of Richmond. In a passage which is well known her Ladyship there referred to the hypothetical circumstance of Ms Campbell or some other well known person popping out to the shops for a bottle of milk, a perfectly innocuous activity. She said in that context of Ms Naomi Campbell:

> "She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it."

She referred in that context also to the view of the New Zealand judge, Randerson J in Hosking v Runting [2003] NZLR 385 which concerned what she described as a similarly innocuous outing. In other words, what her Ladyship was making clear in that case was that, even though there may not be any particularly high value in the exercise of freedom of speech by a newspaper or magazine in circumstances of that kind, it does not really matter because there is nothing on the other side of the scales of privacy to counterbalance the publisher's right of freedom of speech.

14. That is essentially the position here, as the defendants submit, namely that because there is no reasonable expectation of privacy in the information yielded by that photograph of the claimant there is no reason why their exercise of free speech should in any way be inhibited.

15. Helpful guidance was given by the Court of Appeal in the case concerning the author of the Harry Potter books which is known by the name of Murray v Express Newspapers plc [2008] EWCA Civ 446 at paragraph 36. The court is required to take into account such factors as the following in making a judgment about whether there is or is not a reasonable expectation of privacy. The Master of the Rolls said:

> "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

16. Not much turns on the attributes of the claimant in this particular case, although Mr Hirst has drawn my attention to a number of matters which he says would indicate that hitherto the claimant has not appeared to attach particular importance to her rights of privacy so far as her relationships are concerned. He drew my attention to a publication after she left prison in another newspaper, where she described in some detail sexual encounters which she had had with the male immigration judge. I do not

attach great significance to that myself. What seems to me to be of more significance, in arriving at a conclusion whether there was a reasonable expectation of privacy, is the nature of the activity in which she was engaged at the time when the photograph was taken. It was just walking around the prison grounds. Whether it was for exercise or to go to some particular place I do not know and it does not matter, but it was the equivalent of what Baroness Hale called "popping out for a pint of milk"; that is to say it was a perfectly innocuous activity.

17. The nature and purpose of the intrusion is fairly obvious. It was a photograph taken by someone with a view to publication in the newspapers to exploit in a continuing way the publicity which has surrounded her over the allegations made during the course of the criminal trial. There was no consent because the photograph was taken from a distance and consent did not arise. It seems to me that essentially the defendant is correct in submitting that there is no reasonable expectation of privacy in respect of this photograph.

18. There is a further argument based on limitation which was upheld in a similar claim brought against the Ministry of Justice for alleged infringement of privacy. What was being alleged at that stage was that some employee of the Ministry of Justice in the Prison Service was responsible for the photograph. There was no evidence of that and various arguments were addressed by the district judge in an interesting judgment, as a result of submissions made to him by Mr Iain Christie on behalf of the Ministry of Justice. The learned district judge was prepared to accept on that occasion arguments to the effect that it was appropriate to approach infringements of privacy on the basis that there was a limitation period analogous to that in defamation. I am not prepared to go that far because it is unnecessary for today's purposes. It seems to me that before addressing the question of limitation, for the relatively new cause of action delineated by the House of Lords in Campbell v MGN, further argument would be required. There is plainly no statutory limitation period in respect of privacy claims and it is suggested by the learned authors of "Tugendhat and Christie on Privacy" that it may be appropriate in some circumstances if the claim is an equitable one in nature for a decision as to the limitation period to be arrived at by way of analogy with the nearest equivalent common law claim. I am doubtful myself as to whether or not it is possible to say that an analogy can be drawn with the very specific limitation period in defamation claims of one year introduced by Parliament on such a limited basis. I do not need to decide the point, however, and I make clear that I am not doing so, because it is unnecessary on the facts of the present case.

19. I will set aside the judgment in default which was entered on 20 June. It is unnecessary for me to make an order for consolidation because it seems to me that neither claim has any realistic prospect of success and therefore the defendant is entitled to summary judgment in respect of each these two disparate claims. That is my ruling.