Neutral Citation Number: [2008] EWHC 3066 (QB)

Case No: HQ08X03101

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2008

Before :

THE HON MR JUSTICE TUGENDHAT

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Between :

Sir Elton John	**Claimant**
- and -	
Guardian News & Media Limited	**Defendant**

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- -

Mr William McCormick (instructed by **Carter Ruck**) for the **Claimant**
Mr Gavin Millar QC & Mr Anthony Hudson (instructed by Isobel Griffiths **Solicitor**) for the **Defendant**

Hearing dates: 5th December 2008

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Judgment

Mr Justice Tugendhat :

1. In the issue of *The Guardian* dated Saturday 5 July 2008, in its Section entitled "Weekend", there were published the following words:

   "**A PEEK AT THE DIARY OF** …..

   Sir Elton John

   What a few days it's been. First I sang Happy Birthday to my dear, dear friend Nelson Mandela – I like to think I'm one of the few people privileged enough to call him Madiba – at a party specially organised to provide white celebrities with a chance to be photographed cuddling him, wearing that patronisingly awestruck smile they all have. It says: "I love you, you adorable, apartheid-fighting teddy bear."

   The next night I welcomed the exact same crowd to my place for my annual White Tie & Tiaras ball. Lulu, Kelly Osbourne, Agyness Deyn, Richard Desmond, Liz Hurley, Bill Clinton – I met most of them 10 minutes ago, but we have something very special and magical in common: we're all members of the entertainment industry. You can't manufacture a connection like that.

   Naturally, everyone could afford just to hand over the money if they gave that much of a toss about Aids research – as could the sponsors. But we like to give guests a preposterously lavish evening, because they're the kind of people who wouldn't turn up for anything less. They fork out small fortunes for new dresses and so on, the sponsors blow hundreds of thousands on creating what convention demands we call a "magical world", and everyone wears immensely smug "My diamonds are by Chopard" grins in the newspapers and OK. Once we've subtracted all these costs, the leftovers go to my foundation. I call this care-o-nomics. **As seen by Marina Hyde**"

2. Sir Elton John ("the Claimant") sues for libel. The Defendant issued an application notice dated 5 November, which is now before me, by which it seeks rulings on the meanings attributed to the words complained of by the Claimant in his Particulars of Claim paras 7 and 8, pursuant to CPR Part 53 Practice Direction para 4.1. The primary ruling that the Defendant seeks is that the words complained of are not capable of bearing those meanings. The Defendant also asks for a ruling that the words complained of are only capable of being regarded as comment. By that notice the Defendant also applies for orders that the claim be struck out pursuant to CPR Part 3.4(2), or for summary judgment under CPR Part 24, alternatively that para 8 of the Reply (the plea of malice) be struck out under CPR Part 3.4(2). There is no application by the Claimant before me.

3. The parties to this action are too well known to need any introduction.

4. The Claimant is, amongst other things, the founder and Chairman of the Elton John Aids Foundation ("EJAF"). This is a registered charity with the objectives of providing funding for educational programmes targeted at preventing the spread of HIV/AIDS, the elimination of prejudice and discrimination against those affected by HIV/AIDS and assisting people living with or at risk from HIV/AIDS. Since 1999 the Claimant and his partner (who is not a claimant) have hosted at their home an annual event known as the White Tie & Tiara Ball ("the Ball") which is organised for the benefit of EJAF.

5. The Ball took place on the tenth occasion on Thursday 26 June 2008. Arrangements were made with the publishers of OK! magazine for photographs of those attending the Ball to be published, as they were in its issue dated 8 July. That issue was available for sale on 1 July. It is pleaded in the Particulars of Claim in support of a claim for aggravated damages. Ms Hyde ("the journalist") states that she had already filed the words complained of before that date. However she was aware of the event and the scale of the sums raised from previous years, and had read numerous other articles about the Ball before she wrote the words complained of.

6. Pages 70 to 89 of that issue of OK! contain images of those attending the Ball under the heading "OK! INVITES YOU TO JOIN US AT THE SUMMER'S GLITZIEST PARTY – WHITE TIE AND TIARA BALL – THE STARS DAZZLE IN CHOPARD AS THEY JOIN SIR ELTON JOHN AND DAVID FURNISH FOR THEIR ANNUAL EXTRAVAGANZA". Many of the pages include images of the Claimant together with others, of whom some, such as President Clinton, are very famous. The text includes the information (which is not in dispute) that all costs are underwritten by sponsorship from companies, which means that all revenues from the ticket sales, auction lots and pledges goes directly to the charity's projects.

7. The Ball has raised many millions of pounds in previous years and some £10 million in 2008, bringing the total raised to more than £38 million, according to information provided by the Claimant and not disputed before me.

8. On 25 June, a celebration of the 90th birthday of Nelson Mandela was held at which the Claimant sang Happy Birthday.

9. A Claim Form and Particulars of Claim were served, dated 7 August. This followed an exchange of correspondence. None of the meanings complained of in the letter dated 7 July 2008 (in which the Claimant's complaint was first made) is pleaded in the Particulars of Claim, and the meanings pleaded in the Particulars of Claim were not suggested in that letter. The meanings pleaded on behalf of the Claimant are as follows:

> "7. In their natural and ordinary meaning the words complained of meant and were understood to mean that the Claimant's commitment to EJAF and its aims and objectives is so insincere that he
>
> 1) hosts the White Tie & Tiara Ball knowing that once the costs of the Ball have been covered only the small proportion of the money raised which is left over is available for EJAF to distribute to good causes and;

2) uses the White Tie & Tiara Ball as an occasion for meeting celebrities and/or self promotion rather than for raising money for EJAF and the good causes it supports.

8. By way of innuendo the words complained of meant and were understood to mean that the commitment of the Claimant to the stated aims and objectives of EJAF is so insincere that he dishonestly or falsely claims that all the money raised by the White Tie & Tiara Ball goes to EJAF whereas the true position is that once the costs of the Ball have been covered only the small proportion of the money raised by the Ball which is left over is available for EJAF to distribute to good causes.

PARTICULARS OF INNUENDO

1) The programme for the 10th White Tie & Tiara Ball carried an introduction from the Claimant which stated that "…every penny raised goes to [EJAF]."

2) In the premises, the said facts and matters would have been known to a substantial but unquantifiable number of readers of the words complained of and these readers would have understood the same to bear the meaning set out at paragraph 8 above."

10. The plea of aggravated damages includes an allegation that the journalist knew that the words complained of were false in the meanings set out in paras 7 and 8 of the Particulars of Claim. The claim for aggravated damages covers seven of the eleven pages of the pleading.

11. The Defence refers to the lavish entertainment and the coverage by OK! There are denials that the words complained of bore or were capable of bearing the meanings pleaded in the Particulars of Claim paras 7 and 8. No other defence is raised in relation to those meanings. At para 11 there is pleaded a meaning in respect of which the Defendant raises a defence of fair comment. The facts identified as forming the basis of the comment are the facts relating to the Claimant, to EJAF and to the Ball set out above. The meaning pleaded is as follows :

"11. If and insofar as the words complained of bore the meaning that the Claimant's conduct in arranging a lavish celebrity ball was distasteful and wasteful, because all of the money spent on the ball should have been given to EJAF, they were fair comment on a matter of public interest. The matter of public interest was the Claimant's method of fundraising for his charity."

12. There is a Reply. It is admitted that the Claimant's fund-raising for EJAF is a matter of public interest, but it is denied that the words complained of were comment. There is a plea of malice. The particulars given are as follows:

1) "Ms Hyde knew it to be false and/or did not believe it to be true that the sum of money received by EJAF was reduced by the costs of the ball.

2) The Claimant will rely upon the admissions in paragraphs 14.4 and 14.6 that at all material times Ms Hyde believed that the costs of the ball were met by the sponsors and that all the money raised through ticket sales, auction lots and pledges went (without any deductions) to EJAF.

3) Ms Hyde wrote (in the words complained of) that the ball cost "hundreds of thousands" of pounds. Ms Hyde read press coverage of the ball before she wrote the words complained of which reported variously that the ball had raised £10,000,000 or £6,600,000 and/or that 620 tickets for the ball had been sold for £3,000 each (i.e. £1,860,000) and/or that the 2007 ball had raised £6,100,000

4) Ms Hyde did not believe that the money received by EJAF was what was "left over" after the costs of the ball had been paid. She knew that on any view the amount raided for EJAF was many times the amount spent on the ball."

THE LEGAL PRINCIPLES

13. The principles to be applied in an application for a ruling on meaning are well known and need not be set out here. Each party has reminded me of them in their written submissions, citing very well known cases including *Skuse v Granada* [1966] EMLR 278 at 285, *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263, *Berezovskly v Forbes* [2001] EMLR 45 para 16 and *Jameel v The Wall Street Journal Europe SPRL* [2004] EMLR 89.

14. Mr Millar stressed the passage in *Gillick* para 7 in which it is said that if the judge decides that any pleaded meaning falls outside the permissible range, then it will be the judge's duty to rule accordingly. Mr McCormick stresses the passage in *Berezovsky* para 16 where the Court said that the test is:

> "… not what the words mean but what a jury could sensibly think that they meant. Such an exercise is an exercise in generosity, not in parsimony… if … it appears that the judge has erred on the side of unnecessary restriction of meaning, [the Court of Appeal] may be readier to take another look".

15. Mr McCormick also referred to the less commonly cited case of *Berkoff v Burchill* [1996] 4 All ER 1008, where Millett LJ said at p 1018j:

> "Many a true word is spoken in jest. Many false ones too. But chaff and banter are not defamatory, and even serious imputations are not actionable if no-one would take them seriously. The question, however, is how the words would be

understood, not how they were meant, and that is pre-eminently
for the jury".

16. I do not read these authorities as saying that a judge hearing a meaning application may more safely err on one side than on the other. That would not be consistent with the overriding objective. If the judge does err in holding words to be incapable of bearing a meaning pleaded by a claimant, then he deprives the claimant of his right to vindicate his reputation before a court. If the judge errs in holding words to be capable of a meaning pleaded by a claimant, then the defendant is wrongly burdened with defending libel proceedings. This can be a very onerous burden and one which interferes with the right of freedom of expression.

17. Mr Millar cited a number of Strasbourg authorities to the effect that an adverse finding for expressing honest value judgment is very likely to involve a violation of ECHR Art 10. Those cases related to final judgments, but the principle must also apply to rulings on meaning. As Mr Millar submits, the Strasbourg cases show that a claimant can make an action more difficult to defend by characterising an impugned statement as fact rather than as a value judgment. A claimant can also do that by attributing to an impugned statement a meaning that is on any view high. There is a real risk of a violation of Art 10 if a claimant strains to attribute to words complained of a high factual meaning, which cannot be defended as true, and at the same time claims aggravated damages on the footing that the defendant knew the words to be false in that meaning.

THE CLAIMANT'S PLEADED MEANING

18. The first question under this heading is whether the words complained of are capable of bearing the meanings attributed to them in the Particulars of Claim paras 7 and 8. It is clear from these paragraphs, and repeated in the Reply para 7, and in Mr McCormick's submissions, that the Claimant's case is that the words complained of are statements of fact and are not comment. In so far as the meanings pleaded include the statement that the Claimant knows that "only the small proportion of the money raised which is left over is available to EJAF to distribute to good causes", I agree that these meanings are only capable of being allegations of fact.

19. It is the Defendant's case that the words complained of are not capable of bearing these pleaded meanings, that they are not capable of being understood as statements of fact by the Defendant, but that they are capable only of being comment or opinion.

20. It is common ground that the meaning of words, in law as in life, depends upon their context. Mr Millar identifies two senses of the word "context". First there is context in the sense of all the circumstances under which the words were published. Second there is context in the narrower sense of the whole of any other words published on the same occasion, of which the words complained of form a part.

21. Here the context in the first sense includes the two recent events referred to in the words complained of (the birthday party and the Ball). In the Defence para 7 there is pleaded that the words complained of are in a column which is part of a weekly series. Mr McCormick submits that this is not relevant context, citing *Telnikoff v Matusevitch* [1992] 2 AC 343, 352E-G. I do not need to rule on that issue in this judgment.

22. In the second sense context includes the edition of the newspaper in question taken as a whole, and the particular section of the newspaper in which the words complained of appeared. The section is headed "Weekend" and dated 5 July 2008, which was a Saturday. This section is made up of 104 pages (including advertisements), illustrated in full colour, and is itself divided into sections headed Starters, Fashion, Food & Drink, Features and so on. Like the Saturday editions of a number of other English newspapers aimed at an educated readership, *The Guardian* is made up of separate or pull out sections, of which Weekend is only one. While different types of speech can appear in any of these sections, the designation of the section assists in understanding the extent to which particular speech is to be understood as factual or not. Weekend is not the news section of the paper.

23. The words complained of appear on p16 of Weekend, occupying the last twelve or so lines across three columns at the bottom of the page. The title does not indicate what statement the reader is to expect, as title to news articles generally do. The words are presented under the heading "A peek at the Diary of Sir Elton John", that is, as if they are an extract from a diary written by the Claimant "as seen" by the journalist. But it is common ground that no reasonable reader could understand them as being written by the Claimant. Mr McCormick also accepts that the reasonable reader would have recognised they are what he calls an "attempt at humour".

24. The transparently false attribution is irony. Irony is a figure of speech in which the intended meaning is the opposite of that expressed by the words used. The words complained of are obviously words written by the journalist, who has attributed them to the Claimant as a literary device. The attribution is literally false, but no reasonable reader could be misled by it. Mr Millar submits that the part of the words complained of on which the pleaded meanings are based is also irony. Whatever it means, the passage in question is presented in the words complained of as an allegation that the Claimant is making against himself.

25. Irony is not always a form of sarcasm or ridicule, although it is often used in that way. It is the Defendant's case that that is what it is in the present case. The Claimant accepts that the words complained of are obviously an attempt at humour, as well as being a snide attack on the Claimant. Nevertheless, his case is also that the reasonable reader could understand the words complained of to be statements of fact about the Claimant. As he puts it, the device is to take factual matters and put words into the Claimant's mouth to reveal his true attitude.

26. It is the Defendant's submission that the words complained of are obviously not attributing to the Claimant statements that could be understood as factual statements whether by him or about him. Rather, not only is the attribution transparently false, but the relevant statements which appear to be of fact are transparently not so.

27. It is correct, as Mr McCormick submits that there are in the words complained of a number of statements of fact attributed to the Claimant which are true, and obviously intended to be understood as true. These include that there had been a birthday party for Nelson Mandela at which the Claimant had sung "Happy Birthday", that this event had been followed by the Claimant's Ball, which was a lavish affair in support of the EJAF, and that pictures of the guests appeared in OK! and other publications.

28. The following words ("But we like to give guests … in the newspapers and OK!) include statements of both fact and opinion attributed to the Claimant, and referring to his guests. It is not a part of the Claimant's case that a reasonable reader could understand that the Claimant had published about his guests that they would not attend any function that was not preposterously lavish, or that they appeared immensely smug.

29. That part of the words complained of which mainly founds the meanings pleaded by the Claimant is the following and penultimate sentence ("Once we've subtracted all these costs, the leftovers go to my foundation"). In form these words are a statement by the Claimant that he (and his fellow organisers, who are not claimants) subtracted from the money raised through the Ball all the costs of providing the lavish evening, including the costs incurred by the guests for new dresses and diamonds, and that it was only the balance that went to the charitable foundation.

30. If these words did mean what the Claimant claims they mean in paras 7 and 8 of the Particulars of Claim that would be a very serious allegation.

31. Mr Millar submits that it is clear that such a serious allegation is not what a reasonable reader would understand to be made in a piece which is humorous, (or is an attempt at humour). He submits that no reader could sensibly think that the words complained of mean that the money raised by the Ball was used to cover the costs and that only a small proportion of this money was available to the charitable objectives. He cites, as an example of the right approach, the Scottish case *McLeod v Newsquest (Sunday Herald) Ltd* [2007] ScotCS CSOH 4, in particular at para 24. He submits that the words complained of are obviously a form of teasing.

32. I accept the submissions of Mr Millar. The words complained of, and in particular the penultimate sentence, could not be understood by a reasonable reader of *The Guardian Weekend* section as containing the serious allegation pleaded in para 7 of the Particulars of Claim. If that was the allegation being made, a reasonable reader would expect so serious an allegation to be made without humour, and explicitly, in a part of the newspaper devoted to news.

33. In my judgment the case is even clearer in relation to para 8, that is in the case of a guest who had read the Invitation, and who then read the words complained of. If *The Guardian* were to expose a fraud of the kind that is alleged in the meaning pleaded in para 8, then such a reasonable reader could be sure that the exposure would be written without any attempt at humour, and published in a part of the newspaper where such serious factual allegations are recognisable as such. Unless a reader who had also read the Invitation to the Ball was exceptionally suspicious or naïve, he would be bound to understand that the words complained of were not to be understood as a factual statement as to how the money raised was spent.

34. Accordingly, I rule that the words complained of are not capable of bearing the meanings attributed to them in paras 7 and 8 of the Particulars of Claim.

35. The second question under this heading is whether the words complained of are capable of bearing a meaning which is a defamatory statement of fact, or whether they are capable only of bearing a meaning which is a comment.

36. In the light of my conclusion on the first question, I can only answer this question in this judgment on the footing that I am mistaken in the decision I have reached. If I am not mistaken in that decision, the Claimant must reconsider his Particulars of Claim. The case cannot go forward without a meaning pleaded by him: see para 2.3(1) of the Practice Direction to CPR Part 53. The Defendant has pleaded the meaning which it relies on, in para 11 of the Defence, and seeks to defend that as fair comment. If the Claimant proposes to amend his Particulars of Claim to put forward another factual meaning, then that will be the time to decide (if there is a dispute) whether any new meaning is one which the words complained of are capable of bearing, and if so whether it is fact, or can only be comment. In para 39 of his written submissions Mr McCormick states that if the court rules that the words complained of are only capable of being comment, then the Claimant will put forward a defamatory meaning substantially more serious than that pleaded by the Defendant. But there is no such draft, nor any application by the Claimant, before me.

37. On the assumption that I am mistaken in my decision, and that the words complained of are capable of bearing the meanings pleaded in either or both of paras 7 and 8 of the Particulars of Claim, the question whether they are only capable of bearing a meaning that is comment does not arise.

THE DEFENDANT'S PLEADED MEANING

38. Mr McCormick submits that the meaning pleaded by the Defendant in the Defence para 11 is one which could not be defended by a defence of fair comment. He argues that the facts on which the comment is based are not truly stated, in that the facts that are stated are distorted (*Branson v Bower* [2002] QB 737 paras 29 and 38).

39. The parties have argued fully a number of points on which it may be helpful if I express my preliminary views. My preliminary view on this submission is that it depends upon the submission that the words complained of are capable of bearing the factual meaning that I have held they cannot bear.

40. Mr McCormick also argues that the opinion that "all of the money spent on the ball should have been given to EJAF" is outside the range of opinions that someone could honestly express on the basis of the facts stated or referred to. He referred to *Branson v Bower* [2002] QB 737 para 33 and *Tse Wai Chun v Cheng* [2001] EMLR 777, para 20 ("the comment must be one which could been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views") and *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB); [2007] 2 WLR 595 para 74(7)). In a witness statement dated 5 November 2008, para 8, the journalist states that she holds that opinion. I cannot say that the defendant fails to come within the permitted range of opinion. It would not be right for me to withdraw from the jury, at least at this stage, the defence of fair comment advanced by the Defendant.

41. The submission is in any event premature. First, as already noted, there is no application by the Claimant before me, and second, the action cannot proceed until the Claimant has pleaded a new meaning, if so advised. So the issues relating to the Defendant's meaning do not yet arise. The view I have expressed is therefore a preliminary view, which should not bind any future judge who may come to rule upon this point at some future point.

42. Mr Millar also raises as a separate question whether the words complained of are capable of bearing any defamatory meaning referring to the Claimant. He submits that any meaning can be understood only as referring to celebrities generally, and those who attended the Ball in particular, but in any event not to the Claimant.

43. This point also does not arise for consideration, since I have ruled against the Claimant on his pleaded meanings, and he has advanced no other meaning. My preliminary view is to reject this submission. While the words attributed to the Claimant may include remarks critical of the guests and sponsors and of celebrities generally, my preliminary view is that the words complained of are capable of being understood as containing a criticism of the Claimant's promotion of the Ball. The fact that the criticism is attributed to the Claimant does not seem to me to prevent the reasonable reader understanding that it is directed at the Claimant.

MALICE

44. The Defendant applies to strike out the plea of malice. Mr Millar submits that the plea is entirely dependent upon the Claimant maintaining the meaning that the costs of the Ball were subtracted from the money paid to the foundation.

45. Since I have held that the words complained of are not capable of bearing that meaning, it follows that there is no basis for the plea of malice as it is now framed. But again, the point does not arise unless and until the Claimant pleads a meaning which the words complained of are capable of bearing.

46. If I am wrong in my decision on meaning, then Mr Millar submits that the plea of malice should be struck out on a different basis. A plea of malice must be directed to the plea of fair comment that the defendant has advanced. The plea that is advanced identifies the facts on which the comment is based. Those facts do not include that the sum of money received by EJAF was reduced by the costs of the Ball. Accordingly, I accept that the plea of malice is irrelevant to the plea of fair comment in fact advanced in this action. It would fall to be struck out on that basis.

CONCLUSION

47. I have concluded that the words complained of are not capable of bearing the meanings pleaded in paras 7 and 8 of the Particulars of Claim. The only Order that I propose to make, subject to submissions following the distribution of this judgment in draft, is that the claim will be struck out unless, within a time to be determined following the handing down of this judgment, the Claimant puts forward an amendment to plead an alternative meaning which is agreed, or which is the subject of an application to the court for permission.