Case No: A2/2006/1720

Neutral Citation Number: [2007] EWCA Civ 416

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE TUGENHAT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 3rd April 2007

Before:

LORD JUSTICE BUXTON
LORD JUSTICE WILSON
and
LORD JUSTICE MOSES

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Between:

EDWARDS

Appellant

- and -

GOLDING & ORS

Respondent

- -

- -

MR A DAVIES (instructed by Osmond & Osmond) appeared on behalf of the Appellant.

MR D PRICE (instructed by David Price Solicitors) appeared on behalf of the Respondent.

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Judgment

Lord Justice Buxton:

1. This appeal arises out of a municipal election in the Tipton Green Ward of the Sandwell Metropolitan Borough Council that took place, regrettably, as long ago as May 2002. In that election the appellant, Mr Edwards, was a candidate for the Freedom Party. During the election a newspaper called The Voice of Freedom was distributed in the ward and, we were told this morning, also widespreadly in other parts of the country. The Voice of Freedom supports the British National Party. It contained an article very critical of Mr Edwards. It was set out in full by the judge in paragraph 3 of his judgment but we do not need to quote any more than this, which was the last paragraph of the article complained of:

> "He [that is, Mr Edwards] is believed to be planning to stand in Tipton Green, despite the fact that he is not legally entitled to do so, having turned his back on Tipton years ago to move to a £170,000 yuppie house in the posh village of Wombourne, in the leafy Staffordshire countryside."

2. The judge explained (and this is simply a summary because we were taken to the actual detailed pleading), and in my respectful view accurately explained, that the meanings complained of in that last paragraph were that Mr Edwards intended to stand for the election as a borough councillor for that authority even though he was not legally entitled to do so, and no longer had any interest in the welfare of the ward in question and of its electors.

3. A libel action was commenced promptly on the publication of this newspaper. The original defendants to it were the First Defendant, Mr Golding, described as the editor of The Voice of Freedom, and the Second Defendant, Mr Darby, on the basis that it was he who had caused The Voice of Freedom to be distributed within Tipton Green. That action proceeded without a great deal of dispatch. The proceedings were never served on the First Defendant, who is said to be untraceable.

4. On 12 July 2005 -- that is to say, three years after the action had started -- the case against the Second Defendant was discontinued. That was because, Mr Davies for Mr Edwards tells us, shortly before the trial of the action a large amount of material was produced by Mr Darby, the Second Defendant, demonstrating he had not had anything relevant to do with the distribution of the newspaper The Voice of Freedom. That departure was precipitated by the fact that Mr Griffin, the (as he became) Third Defendant and the respondent to the present appeal, had as part of Mr Darby's defence signed a statement in which he said that Mr Darby had not been responsible for the publication but that he, Mr Griffin had, or at least had partially, been so responsible.

5. In response to that Mr Edwards, at the same time as he sought to discontinue against Mr Darby, applied to join Mr Griffin as a party to those same proceedings. Gray J, who made the order for discontinuance, had been told that that was the intention and on 19 July -- that is to say, after the action had been discontinued against Mr Darby -- an application notice was issued, asking for an order that Mr Griffin be joined as Third Defendant and:

> ”So far as necessary any limitation period be disallowed pursuant to section 32(a) of the Limitation Act 1980 because he [that is, Mr Griffin] is the author of the words pleaded at paragraph 4 of the Particulars of Claim herein, a fact that the claimant only learnt on 5 or 6 July 2005.”

6. The first thing to say about that application to join Mr Griffin to these particular proceedings is that it was, in my view, plainly misconceived. The action to which it was sought to join Mr Griffin could not realistically be pursued against the First Defendant because he had never, in three years, been served, and by the time of the application for joinder the action had been discontinued against the Second Defendant and indeed, even at the time when the application for joinder was first mooted it was the firm intention to discontinue against the Second Defendant.

7. So although at the time which Mr Griffin was sought to be joined there might have been the shell of an action still in existence, that could in no sense be called a continuing and active action suitable for the joinder of a further party. What Mr Edwards should have done was to start a fresh action against Mr Griffin. His advisors may well have demurred at that course because of the obvious limitation problem that by section 4A of the Limitation Act 1980, and subject to certain qualifications to which I shall have to come in due course, an action for libel has to be commenced within 12 months of the accrual of the cause of action. They will also have appreciated, and accept in these proceedings, that Mr Edwards could not use the machinery for a change of parties after the expiry of the limitation period that is provided in rule 19.5 of the Civil Procedure Rules. That rule provides in part that the court may add or substitute a party only if the relevant limitation period was current when the proceedings were started and the additional substitution is necessary. The reason why that could not apply in this case is that “necessary” means necessary for the present action. First there was, as I have said, no relevantly appropriate present action in being, and secondly, even though the original action was still in existence in theory, it was not necessary for that action that Mr Griffin should be party to it.

8. Be all that as it may, the application was heard by Master Eyre on 1 September 2005. He ordered the joinder of Mr Griffin as a defendant and the claim form was amended on the same day and amended particulars served very shortly thereafter. Mr Griffin filed an acknowledgment of service a month later, saying that he would defend all of the proceedings; but he did not file a defence and on 29 November 2005 Mr Edwards obtained judgment in default of defence, damages to be assessed. The objection that I have just outlined was not raised on behalf of Mr Griffin, who was not formally represented, though he was accompanied by a solicitor not currently practising who was acting *pro bono*. Nor was the issue drawn to the Master’s attention by the lawyers representing Mr Edwards at that application.

9. On 30 June 2006, many months of course after the hearing before Master Eyre, an application was filed by Mr Griffin, now represented by Mr Price, who also represents him today. That application was to set aside the order of Master Eyre. That application was heard and granted by Tugendhat J, from whose grant to set aside the order Mr Edwards now appeals.

10. The grounds advanced before Tugendhat J were that the limitation period for the publication complained of had expired in or about March 2003; that, as we have already seen, Civil Procedure Rule 19.5 did not apply; and it was also urged that the alleged ignorance on the part of Mr Edwards as to Mr Griffin's role in the publication could not, as a matter of law, affect the date on which the limitation period expired. Various other defences other than limitation were also indicated.

11. We have to go first to the Master's reasons for granting the joinder. There is no note of his judgment, but in paragraph 16 of his judgment Tugendhat J related what he had been told by Mr Davies as to the Master's reasons. The Master said that there was a triable issue as to whether Mr Edwards had known until very shortly before the hearing on 12 July 2005 that Mr Griffin was the author. He would therefore permit the joinder of Mr Griffin and leave it to him to plead a limitation defence, if so advised. The Master accepted the submission made to him by Mr Davies that knowledge of the identity of the publisher was part of the cause of action. The Master said that he was joining the Third Defendant without prejudice to any defence of limitation.

12. The judge found that there were two bases on which the Master's order was wrong and, as the judge thought, made without jurisdiction. The first was that the application to join Mr Griffin, as opposed to starting a new action against him, was misconceived, broadly for the reasons already set out. The second was that the Master was mistaken in thinking that his order would permit the limitation issue to be raised by Mr Griffin in the proceedings that the Master permitted to be pursued. The judge explained why that was at the end of paragraph 17 of his judgment. He said that if a party is joined he is treated as having been a party from the beginning of the original action, that being the force of section 35.1(b) of the Limitation Act 1980. He therefore lost his limitation defence, such as it might be. The judge said that it was at least arguable that the proper practice, in a case where a new defendant might have a limitation defence, was to bring a new action.

13. Although Mr Davies before us was, if I may say so, not wholly clear on this issue, I think that he agreed that he could not challenge the judge's view of the effect of section 35.1(b), and certainly he did not do so in his grounds of appeal.

14. Section 32A of the Limitation Act 1980 does, however, give a discretionary power to the court to allow the action to proceed outside the one year period for libel. Tugendhat J said that any such application must precede the beginning of the fresh proceedings.

15. Before us Mr Edwards contends that the judge's decision was wrong for two different kinds of reason. First, he was wrong in thinking that the limitation period had expired at the date of Master Eyre's order; therefore, the order did not deprive Mr Griffin of an accrued limitation defence. Second, Mr Edwards said that even if the judge had been right in his view of the law, the procedure adopted by Mr Griffin was not open to him. Mr Griffin had applied under rule 3.1(7) of the Civil Procedure Rules to revoke Master Eyre's order. He should not have done that, but should have appealed that order. He was far too late to appeal, not having applied to set aside Master Eyre's order of 1 September 2005 until 22 June 2006. That delay also meant that even the procedure under rule 3.1(7)

was not now available to him, even if originally it would have been; and in particular it was unfair that by taking that step Mr Griffin was able to avoid what otherwise he would have had to do, that is to say fulfil the requirements of the rule 3.9 checklist in applying for permission to appeal.

16. I will deal first with the limitation issue. On Mr Edwards' case (which is said by Mr Griffin to be factually untrue, a matter not resolved in these proceedings but which I will accept for the purposes of the present enquiry) Mr Edwards did not know the identity of Mr Griffin as the author of the defamatory material, and therefore did not know who to sue, until very shortly before he applied to be joined. He accordingly argues that the limitation period itself did not commence until he knew who his defamer was and thus who to sue.

17. The judge rejected that argument as contrary to principle, and so would I. Two separate issues must be distinguished. First, when did the cause of action accrue, which is the test for determining when the limitation period starts to run. Second, in cases where the claimant had not started proceedings within that limitation period, should the court nonetheless allow his action to proceed? That, in a case of defamation, is provided for by section 32A of the Limitation Act, which provides that the court has to decide whether it would be equitable to allow an action to proceed outside the limitation period, having regard to various matters including the length of and the reasons for the delay on the part of the plaintiff, and also his knowledge of matters relevant to the cause of action. Such relief is only needed where a cause of action has accrued before the expiry of the one-year limitation period. The cause of action accrues, in defamation, on publication. That is an objective question, nothing to do with the subjective knowledge of the defamed person, either of the fact of the defamation or the identity of the defamer. If he fails to sue or to sue the right person because he subjectively has not got the information necessary to start proceedings, then he has to ask for relief under section 32A.

18. Mr Davies said that that view was inconsistent with some observations in this court of Rix LJ in Cressey v Tim [2005] EWCA Civ 763. But the learned Lord Justice was there addressing the particular rules for a personal injury case contained in sections 11 and 14 of the Limitation Act, which makes specific provision for the potential extension of time when the identity of a defendant is not known to the claimant. Two things follow. First of all, if the knowledge of the identity of the claimant was required for the cause of action to accrue, then there would be no reason for that provision to be in the Act at all. Mr Davies said that it was there, as it were, as a belt and braces provision. I cannot agree with that. It is quite clear from section 11 and 14 that lack of knowledge is something different from the accrual of the cause of action. Secondly, Rix LJ pointed out that one cannot bring proceedings against -- that is to say, one cannot sue -- X or Y or the person who was responsible for the article, without naming him. That is no doubt right. That is a completely different question from whether the cause of action has accrued. The question of whether proceedings can be brought in respect of a cause of action when one cannot name the party is quite different from whether that cause of action has accrued in the first place, and it is that difference that is recognised by section 14 of the Defamation Act.

19. That being the case, it is perhaps not particularly edifying to exchange oddities that either view would produce. I would simply put on record that Mr Davies did not shrink from the suggestion that if somebody was defamed in an document written in 1930 that then passed into a private record and only came to light in the year 2005, he could nonetheless say that the cause of action in respect of that 1930 document accrued in 2005 because that was the first date upon which he got knowledge of it. I cannot think that that is what Parliament intended. Parliament intended that difficulty to be dealt with by the discretion given to the court of extending the limitation period.

20. Mr Davies said that it was unfair that a party should lose a right and have it replaced by a discretion. That of course assumes that the right existed in the first place, but even that said, difficulties that undoubtedly are caused by attempts to litigate matters that had happened a long time ago are almost always best managed by giving the court a proper power of judgement to deal with them, rather than to try to regulate the problem by rigid rules about accrual of the cause of action. The Master was therefore wrong to think that the cause of action had not accrued in the case before him.

21. The alternative way in which the matter was put was that Mr Edwards could rely on section 32(1)(b) of the Limitation Act: deliberate concealment by the defendant of the fact relevant to the claimant's right of action. It was, he said, arguable -- indeed it was, he said, the case -- that by publishing the article, by writing the article anonymously, Mr Griffin had deliberately concealed from Mr Edwards the fact relevant to the claimant's right of action, that is to say the identity of the publisher.

22. I am not certain that even verbally stated that point is correct, because if the identity of the publisher is something that is not essential to the cause of action, then the point about concealment does not arise. However that may be, it seems to me extremely doubtful that in section 32(a)(b) the statute had in mind a case where there was a merely anonymous publication and no more. The section rather provides that the defendant should not conceal something over and above the acts that he does when actually committing the tort. But it seems to me that we do not need to address that point, for the reason given by the judge in paragraph 77 of his judgment:

> "It is open to the Claimant if thought fit, to make a fresh application to the court to dis-apply the limitation period pursuant to section 32A of the 1980 Act or to rely on section 32(1)(b). I have heard no substantive argument on either of these sections and express no view to the likely prospect of success of either party in relation to them."

No argument having been addressed to the judge, and he not having made any finding on it but having left the matter open, it does not seem to me that the matter can be complained of in this court.

23. In my judgement, therefore, the judge was right to say that Master Eyre's order was objectionable. Was the judge, nonetheless, prevented from setting it aside? The power to vary or revoke an order is, as I have said, dealt with by rule 3.1(7) of the Civil Procedure Rules:

> "A power of the court under these rules to make an order includes a power to vary or revoke the order."

Those terms are very wide. They appear to give the court a broad discretionary power. Mr Edwards relies, however, on general statements of principle to be found in the judgment of this court in Collier v Williams and others [2006] EWCA Civ 20. It is relevant to mention the background to that case. Four or perhaps five cases were listed before this court together, the main concern being what appeared to be a view on the part of the profession that if an order had been obtained ex parte, it was possible to apply under rule 3.1(7) to have it set aside. That (if I may respectfully say so, rightly) was seen by this court to be a means of circumventing the central position of the Civil Procedure Rules that orders should in future be appealed, and not merely be taken to a judge in chambers to be reviewed. The court in the course of reviewing that whole area of the law referred to a judgment of Patten J in Lloyds Investment (Scandinavia) Ltd and Christian Ager-Hanssen [2003] EWHC 1740 (Ch). The judge said this:

> "It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal."

I would just say, in passing, that that last sentence of the extract from Patten J I think demonstrates the particular problem that the judge was addressing in this case. However, the matter was addressed more widely in this court in the judgment of this court delivered by Dyson LJ, at paragraph 40. He quoted what was said by Patten J and then said this:

> "We endorse that approach. We agree that the power given by CPR 3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied. The circumstances outlined by Patten J are the only ones in which the power to revoke or vary an order already made should be exercised under 3.1(7)."

When coming to determine a particular case, this court in paragraph 120 expressed the matter slightly differently. Having referred again to Patten J in paragraph 119 it said this in paragraph 120:

> "In short, therefore, the jurisdiction to vary or revoke an order under CPR 3.1(7) should not normally be exercised unless the applicant is able to place material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion."

24. The basis of that jurisprudence is that the jurisdiction under order 3.1(7) is not a substitute for an appeal. There must be additional material before the court in the form of evidence or, possibly, argument. I would reserve the issue of whether additional argument in itself is enough to attract the jurisdiction of rule 3.1(7), but the general thrust of Collier is that the case before the court before which rule 3.1(7) is moved must be essentially different from one of simple error that could be righted on appeal. As was pointed out in the course of argument, it would be very striking if, taking the words of Patten J literally, new facts could lead to rule 3.1(7) being applied, but that did not apply to a case such as the present, where not new facts but a completely new understanding of the nature of the Master's order was before the judge.

25. The judge held that the case before him was essentially different from that which had been before the Master. He said this in paragraph 35:

> "In *Collier* the Court of Appeal was not concerned with a case where the order made by the court defeated the purpose which, for the reasons given, the court had explained that it wished to achieve. I can only presume that the Master, Mr Davies and the Third Defendant were all proceeding under the same mistake or mistakes. They all thought that the order did leave open to the Third Defendant a limitation defence. If this mistake had been discovered promptly, an appeal would inevitably have succeeded. The question is whether it was necessary to correct it by appealing, or whether it might also be corrected under CPR 3.1(7)."

Then the judge said this in paragraph 36:

> "The Master's mistake as to the effect of the order of 1st December 2005 is fundamental. Given that the limitation period had clearly expired, the order is one which he had no jurisdiction to make, whether in the form which it intended to make, or at all. In these unusual circumstances, it seems to me that this is a case which does come within CPR 3.1(7)."

26. I would respectfully agree. The procedure adopted by Mr Edwards's lawyers was misconceived. It led to Master Eyre making an order that he had no power to make, a) because there was no live action and b) because the limitation period had expired. Master Eyre did not decide item b). If he had that would be a matter for appeal. He made an order intending to keep that issue live, but the form of his order frustrated his intention. It was open to the judge to hold that since the application should never have been made in that form, it could be set aside. That is not to usurp the power of the Court of Appeal, but rather to correct a fundamental procedural error.

27. Mr Davies said that as a matter of principle an unappealed decision such as that of Master Eyre was *res judicata* between the parties. But that rule refers most to final judgments. It cannot be so of interlocutory orders; otherwise, there would be little reason for CPR 3.1(7) to exist at all. Similarly, it was open to the judge to take into account, though it is not clear to me that he was asked to take into account, the point raised before this court by Mr Davies, that by applying to the judge rather than appealing, Mr Griffin had avoided the need to persuade an appellate court that he should appeal out of time in the light of the checklist, as it is called, to be found in Civil Procedure Rule 3.9. As I say, the judge does not appear to have been asked to address that directly. If he had been asked to address it, I have no doubt whatsoever that he would have been influenced in deciding how the checklist should operate by his view of the merits of the case before him, and it would have been open to him to hold -- and I myself would hold in this case -- that the mistaken procedure, and the fact that there was a mistake made, was so overwhelming a factor that clearly permission to appeal should be granted.

28. There was, of course, a long delay before this application was made. That point does not appear to be relied on as such, either in the grounds or in the skeleton argument. The delay was formidable, but the judge did not err in law in not acting on it and he gave detailed reasons, all of which were open to him, as to why he was not going to turn the matter away on grounds of delay.

29. The judge was therefore right to hold that he had jurisdiction under CPR rule 3.1(7) to set the order aside, right to hold that the order was made on a mistaken basis as to limitation, and right to hold that it followed that, joinder having been set aside, that was a good reason -- indeed, a logically unavoidable reason -- under CPR 13.3(1)(b) why a judgment in default, based on that joinder, had to be set aside. That makes it unnecessary to go on and consider the other defences in the draft defence which Mr Griffin wishes to assert.

30. One point is raised on costs. We have not been shown the judge's judgment on that point, but we were told that he ordered Mr Edwards to pay Mr Griffin's costs of the appeal, as to which no complaint is made, but he made no order for costs of the money spent by both parties in preparation of the trial. Mr Edwards says before us that he should get his costs of that preparation because he was misled in going on with the preparation during the period when there was delay in complaining about the joinder. That, it seems to me, was a matter for the judge. He may well have been impressed by the fact that the trial stemmed from the mistaken application to Master Eyre which was the fault, however innocently, of Mr Edwards' advisers.

Lord Justice Wilson:

31. I agree that the appeal should be dismissed.

Lord Justice Moses:

32. I also agree.