Case No:HQ03 X03064

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Neutral Citation number: [2004] EWHC168 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 6 February 2004

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

Claimant

- and -

(1) LENNOX LEWIS **Defendants**

(2) LION PROMOTIONS, L.L.C.

(3) JUDD BURSTEIN

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DESMOND BROWNE QC AND DAVID SHERBORNE (instructed by MORGAN LEWIS & BOCKIUS) for the CLAIMANT

JAMES PRICE QC AND JUSTIN RUSHBROOKE (instructed by FORBES ANDERSON) for the DEFENDANTS

Hearing date: 26 January 2004

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Judgment

Mr Justice Eady:

1. On 26 January 2004 I heard an application on the part of the Defendants to set aside an order of Master Whitaker, dated 2 October 2003, whereby he granted permission to serve the claim form in this libel action out of the jurisdiction. The basis of the application is that "the Court has no jurisdiction under CPR Part 6.20 to give permission for service of the claim form out of the jurisdiction and/or that the Claimant has failed to satisfy the Court that England and Wales is the proper place in which to bring the claim within CPR Part 6.21(2A)".

2. At the end of the day there was no time to give an *ex tempore* judgment but I informed the parties that the application would be dismissed. I now propose to set out my reasons for that decision.

3. It is necessary to explain the circumstances which led to this claim in a little detail. The Claimant, Mr Don King, is well known as a boxing promoter throughout the world. He is not only famous in this country but has in the past promoted, through his company Don King Productions Inc, a number of British boxers including Frank Bruno, Chris Eubank, Nigel Benn and Prince Naseem Hamed. He has also promoted the first Defendant Mr Lennox Lewis, who is the British world heavy weight champion.

4. Like the Claimant, Mr Lennox Lewis is mainly resident in the United States although he remains a citizen of the United Kingdom. He also visits this country regularly and makes appearances on television. The second Defendant, Lion Promotions L.L.C. is a Nevada-based promotion company. The third Defendant is Mr Judd Burstein, who is a New York attorney representing Mr Lewis and his company in litigation now pending in New York. It is that litigation which would appear to be the background to the present dispute.

5. In those proceedings Mr Lewis and Lion Promotions are suing Mr King and Mike Tyson, together with others, in respect of interference with an agreement between Mr Lewis and Mike Tyson in connection with a proposed re-match of their world heavy-weight title contest. There is a claim for 35 million dollars in compensatory damages and 350 million dollars in punitive damages.

6. It appears that the New York litigation has received a good deal of publicity – not least thanks to Mr Burstein putting the complaint on the world wide web on or about 8 May 2003 through the boxing website www.boxingtalk.com. (That is the same website as that on which one of the articles complained of in these proceedings was published.) The complaint was included in an article on that website which was apparently written by one G. Leon and described as "A Boxing Talk Exclusive".

7. The present proceedings are concerned with two publications, the context of which would appear to be the New York claim. First, from 5 July 2003 onwards there appeared on fightnews.com an item entitled "My Response to Don King" which had been written by Mr Burstein. It referred back to an article by a Mr Tim Smith, published in the New York Daily News on 4 July 2003, which included

certain quotations from Mr Don King. Those apparently prompted Mr Burstein to accuse Mr King of anti-semitism. The passage complained of appears in paragraph 5 of the particulars of claim:

> "I have read Don King's recent interviews with Tim Smith and others with great amazement. But for his plainly anti-semitic remark – calling me a 'shyster lawyer' – I would have been merely amused by his desperate and ridiculous charges. Unfortunately, this is not the first time I have encountered such bigotry by Don. Last year, one of his in-house lawyers sent me a letter on Yom Kippur eve demanding that I take action on Yom Kippur. Needless to say, I vigorously objected. Subsequently, that lawyer apologised to me in person while explaining that Don had explicitly refused to permit him to apologise in writing. Since, Don apparently believes that insulting Jews is appropriate conduct (indeed, he reportedly has even playfully imitated Hitler during a press conference), I am sure that no apology will be forthcoming for this more recent conduct.
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> Were it not for the anti-semitic nature of Don's comments, I would probably have remained silent. No one that knows the both of us is likely to take Don's word over mine. But in light of Don having stooped so low, it is time to take the gloves off. … I realise that he has no shame even when he descends into rank bigotry".

8. The second article appeared in the boxingtalk.com website from 8 July 2003 onwards and was entitled "Interview with Judd Burstein". It was written by Mr G. Leon, to whom I have already referred. It contained an interview in which similar allegations about Mr King were made, and those are set out in paragraph 7 of the particulars of claim:

> "July 08, 2003; shortly after returning home from vacation, Lennox Lewis's attorney Judd Burstein found some time to speak with boxingtalk.com. Apparently he knew who the 'others' were in this exclusive one on one interview, Burstein and I discussed the ongoing verbal warfare between he and promoter Don King. As well as Lennox Lewis's suit against Tyson and King, and King's retaliatory counterclaim against Lennox Lewis. Read on to see what the heavy weight champ's attorney has to say.
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> GL: Obviously you've read Don's remarks in my article and Tim Smith's article. What are your thoughts on his comments?
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> …
>
> What got me upset and led me to respond to him was the clearly anti-semitic tone in his comments. The term 'shyster lawyer' when used in connection with a Jewish lawyer is designed to provoke anti-semitic feeling. And if this were just something in isolation I wouldn't care about it. But I was told by a lawyer working for Don King, that he wanted to apologise for demanding action from me on Yom Kippur, and Don King has refused to permit him to apologise to me in writing. It's being reported by papers that he imitated Hitler at a press conference, and I was just told today, that during a negotiation with Shelly

> Finkel, he spent the whole time referring to him as Shelly Finkelstein. He is quite plainly an anti-semite and that kind of conduct and attitude has no place in this modern world. He has every right to disagree with me and take a different position, or argue that I haven't acted appropriately. But when he starts with bigotry, that's when someone has to stand up and say something.
>
> GL: So you have absolutely no doubt that you're not reading too much into what he's saying by accusing him of bigotry?
>
> JB: If this were an isolated incident, I would say that perhaps I was reading too much into it. But it's not an isolated incident and I've seen him play the race card before …"

9. It is pleaded that the words complained of meant that Mr King is a persistent, bigoted and unashamed (or unrepentant) anti-semite.

10. Both the fightnews and boxingtalk articles also contain other serious allegations made by Mr Burstein against Mr King, including charges of corruption, but they do not form part of the complaint in these proceedings. It has been explained by Mr Asserson, Mr King's solicitor, that the reason for this omission is that those allegations will be dealt with by the New York court in the existing proceedings. Indeed, Mr Desmond Browne QC, on Mr King's behalf, told me that the decision had been made to exclude those matters for the very reason that there was a danger of duplication of issues in parallel proceedings and, at least in theory, the possibility ultimately of inconsistent findings.

11. Whatever the reason may be, this creates potential difficulties over quantifying damage in respect of the allegations complained of. It may be that it would therefore be appropriate at some stage to order that the English proceedings should not be heard before the resolution of the claim in New York. But that is for another day.

12. Proceedings were commenced by claim form dated 2 October 2003, and it was on the same day that Master Whitaker gave permission to serve out. The particulars of claim were served on 31 October.

13. After a gap of a month the Defendants applied to set aside the claim form, on 28 November 2003, with the support of witness statements from the first and third Defendants and also one from Mr Stephen Bougourd (who is a signatory of one of the Guernsey companies which are the directors of the second Defendant). Further evidence was served by both sides in due course – some of it rather late in the day.

14. The burden is effectively on the Claimant to demonstrate that it is an appropriate case for service out of the jurisdiction against each of the defendants and that England and Wales is the appropriate forum. Having regard to CPR Part 6.20(8), Mr Browne deployed a number of well known principles.

15. First, it has long been recognised that publication is regarded as taking place where the defamatory words are published in the sense of being heard or read:

Bata v Bata (1948) WN 366. What is more, by analogy, the common law currently regards the publication of an Internet posting as taking place when it is down-loaded: *Godfrey v Demon Internet* [2001] QB 201; *Loutchansky v Times Newspapers Ltd* [2002] QB 783 at [58]; *Gutnick v Dow Jones Inc* [2002] HCA 56 at [44].

16. Secondly, English law does not recognise a "single publication" doctrine: see e.g. *Shevill v Presse Alliance SA* [1996] AC 959; *Berezovsky v Michaels* [2000] 1 WLR 1004.

17. Thirdly, English law recognises in the context of defamation generally that damage is presumed: see again *Shevill v Presse Alliance SA* (cited above).

18. Fourthly, the Claimant is not permitted to complain in these proceedings (and does not seek to do so) of any publication of the defamatory words outside England and Wales: *Diamond v Sutton* (1866) LR 1 Ex 130; *Berezovsky v Michaels* (cited above). It follows that he can only be compensated, strictly speaking, in respect of injury to his reputation suffered here.

19. For the purpose of discharging his burden on the present application, the Claimant is entitled to rely upon what might be described as a general presumption that the natural forum in which to try the dispute is that of the jurisdiction where the tort was committed: see *The Albaforth* [1984] 2 Ll.R. 91 and especially *per* Goff L.J. at p. 96, and *Berezovsky v Michaels* (cited above) *per* Lord Steyn at p. 1013 and 1014. The *locus delicti* has been described as affording a "weighty circumstance" pointing to the jurisdiction where any claim arising should be tried.

20. Sixthly, the law regards it as giving a "significant dimension" to a case if the relevant claimant has a reputation to protect specifically in England. Also, where it is sought to protect a reputation within England and Wales, the courts of this jurisdiction would appear to be the natural forum for achieving vindication and assessing compensation.

21. Finally, it should be remembered that at such an early stage in litigation it is not appropriate to attempt a full appraisal of the merits of either side's case. Inevitably, however, the parties have on the present application addressed the merits at some length both in submissions and in evidence.

22. Bearing in mind these principles, I turn to the Claimant's case on why it is that the English courts are said to be the appropriate forum for resolving the issues.

23. The evidence discloses that Mr King has a substantial reputation in England, and indeed has made frequent appearances on television, radio and through the other media. I need not rehearse that evidence in detail at this stage. Particular reliance was placed upon the fact that he had participated in advertisements on BBC television for their broadcast coverage of the FA Cup. This would hardly have happened, it was argued, if he were not extremely well known to sports fans in this country. Indeed, there was evidence to the effect that Mr King may be the best known person in the world of boxing and "certainly one of the best known people in the world of boxing".

24. There is no doubt also that Mr King has a considerable financial and business connection here, as the result of having promoted a number of fights either in this country or involving British boxers. The precise figure may be in dispute and for present purposes it does not matter, but it is reasonably clear that Mr King through his relevant corporate vehicle has earned revenue from this jurisdiction running into tens of millions of dollars. There is also evidence that he has many business associates and friends in this country.

25. A matter of particular concern is that Mr King has friends and acquaintances within the Jewish community in England - not least because many of the well known people in the boxing world are themselves Jewish.

26. Also, various witnesses have provided evidence to the effect that the two relevant websites are popular and frequently accessed by people interested in boxing within this jurisdiction. Again, I need not go into it in any detail for the purposes of this application.

27. I am also asked to bear in mind that one witness in particular (a Mr Dodson) deposed to the fact that, once news is placed on one or other of these websites, it quickly goes round the boxing community, either by means of phone calls, word of mouth or by the information being forwarded on computers. In this context, I was asked to bear in mind also the words of Bingham L.J. in *Slipper v BBC* [1991] 1 QB 283, 300:

   > "… The law would part company with the realities of life if it held that damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs".

28. Against this background, it is perhaps not surprising that evidence was given to the effect that the particular allegations against Mr King of anti-semitism became common knowledge, among members of the boxing fraternity, very shortly after they were placed on the relevant websites.

29. A major point of contention before me was how Mr King was to demonstrate that Mr Burstein's publications were perpetrated on behalf of either of the other defendants.

30. For this purpose it is necessary to consider the context of the parties' conduct of the New York litigation.

31. Mr Burstein issued proceedings on behalf of the first and second Defendants in these proceedings, as Claimants, against Mr Tyson and Mr King and the relevant corporate entities. In the complaint allegations are made in terms which would be regarded by English lawyers as florid and extravagant. Mr King is, for example, described as "a corrupt promoter … who will stop at nothing – including even death threats, tax evasion and bribery – to advance [his] own cause". Nevertheless, these allegations were placed immediately in the public domain by Mr Burstein (it is reasonable to suppose with the authority of Mr Lewis) as part of his overall strategy. The litigation itself formed only part of the campaign. Mr King was also

attacked by Mr Burstein in press conferences on the subject of the pending New York proceedings.

32. In the light of these particular circumstances, Mr Browne submits that Mr Burstein, and the clients whose interests he was representing, must have regarded such publicity as "the continuation of litigation by other means". Accordingly, he submits that I should take with a pinch of salt the passage in Mr Burstein's first witness statement, for the purposes of these proceedings, where he adopted the formulation that the dispute has unfortunately "spilt over into the press". His suggestion is that Mr Burstein is thereby disingenuously seeking to distance himself from the publicity campaign against Mr King and, to that extent, seeking to give the English court a less than frank account. Mr Browne may very well be right, but I am not in a position to make a final judgment on that matter. Nor is there is any need to do so at this stage.

33. It is against that unhappy background that the responsibility of the first and second Defendants for Mr Burstein's allegations of anti-semitism has to be judged. Mr James Price Q.C., on the Defendants' behalf, argues that the Claimant's case cannot get off the ground because it is based on mere speculation. It must depend, he said, on what passed between Mr Burstein and his clients. Insofar as there are any relevant documents, they would be protected by legal professional privilege (he submits). If there are any such documents, they would only be protected by legal professional privilege if they did indeed relate to advice given by Mr Burstein to his clients in his capacity as their attorney. If Mr Burstein were conducting the campaign, however, either on his own behalf (e.g. because he regarded Mr King's observations about himself as a personal attack), or he was acting in concert with Mr Lewis and Lion in some different capacity (e.g. as a business manager or public relations adviser), it is difficult to see how any documents that passed between them on the subject of the campaign would be so protected.

34. I did not consider that the professional privilege argument was as strong, or central, as Mr Price was suggesting. It seems to me that the Claimant's case in this respect is not so much a matter of speculation but rather of inference. He will be inviting the jury to infer, from the surrounding circumstances I have briefly described, that Mr Lewis and and/or Lion sanctioned the articles complained of in these proceedings as part of the overall strategy against Mr King; that is to say, it would be highly unlikely that Mr Burstein would engage in purely private fisticuffs with Mr King on matters so intimately connected with his clients' ongoing litigation.

35. It may be that a jury would ultimately not be prepared to draw such an inference, but I cannot say at this stage that it is purely fanciful. In that respect, there is a serious issue to be tried. There is at least an argument that Mr Lewis and Mr Burstein must be taken to have been intent on a common global strategy for conducting their dispute with Mr King as effectively as possible. It would no doubt be necessary in this context to consider Mr Lewis's letter in *The Sun* of 27 May 2003, whereby he was apparently canvassing the merits of his litigation before English boxing fans, and also the circumstances in which Mr Burstein came to put the New York complaint on the world wide web. Likewise the background to the interview with Mr Leon would need to be fully explored; so too

the article for fightnews.com on 5 July 2003. Questions arise as to why Mr Burstein's retaliation was not confined to the New York Daily News, where Mr King's observations had originally been published. It is by no means obvious why such an examination would be precluded by considerations of legal professional privilege.

36. Other issues on the horizon are justification, fair comment and qualified privilege. Principally, I suppose, the argument will turn upon whether in describing Mr Burstein as a "shyster lawyer" Mr King was indeed giving vent to anti-semitic or racist attitudes. Mr Burstein's allegations refer to Mr King "believing" that it was appropriate to insult Jews, and it was also alleged that his words were "designed" to provoke anti-semitic feeling. Yet one of the arguments Mr Price has raised, in order to demonstrate that New York would be the appropriate forum, was that it has to be determined how the term "shyster" would be construed in that city. In particular, does it have a special meaning there different from how it would be understood by English readers? I did not find this persuasive for a number of reasons:

    (1) We are concerned with English publication only. What matters, therefore, would be what is conveyed by the words complained of in that jurisdiction.

    (2) It is important to focus not so much on how "shyster" would be interpreted in any particular country but rather on what Mr King's state of mind and motivation was when he uttered the remarks.

    (3) If an equivalent libel action to this were commenced by Mr King in New York it would not, according to the Defendants' evidence, "survive" (because of the different approach of New York law to defamation): See paragraph 11 of Mr Burstein's own witness statement.

    (4) It seems clear from a web search of 900 dictionaries (including specifically American ones) that there is no support for the word "shyster" having any anti-semitic connotations.

37. In the light of the proposition that no such actions as the present could survive in New York, it would seem that some of the other arguments about whether New York would be a more convenient forum become of theoretical interest only. There would seem to be little point in addressing how much more convenient it would be, or would not be, for people to give evidence there rather than here.

38. In any event, however, it seems clear already that the Claimant would wish to adduce evidence from a number of witnesses based in the United Kingdom, on such matters as his reputation and connection with this country and, in particular, his links with Jewish charity work in London.

39. Other arguments raised by Mr Price need to be addressed. He submitted that there has never been another case where a United States resident obtained permission to serve out against another United States resident in respect of a "United States based publication". It seems to me that this misses the point about the nature of internet publications and the fact that English law regards the particular

publications which form the subject matter of these actions as having occurred in England.

40. Mr Price also referred me to a case which he submitted was broadly comparable, namely *Chadha v Dow Jones Inc* [1999] EMLR 724. The Court of Appeal there refused to interfere with the judge's conclusion, on the facts, that the case lacked any sufficient connection with England. There was apparently little evidence of any connection between the claimant and this jurisdiction or of any injury to reputation here. In this case the position is very different. There is ample evidence of Mr King's reputation here, and it is obvious how damaging an allegation of anti-semitism would be – especially perhaps for someone with as many Jewish contacts as this Claimant appears to have.

41. Mr Price argued also that since any relevant acts on the part of the Defendants (and in particular, on the part of the First and Second Defendants) took place in the United States, the Claimant should only be allowed to proceed if he can come within the double actionability rule. The Claimant's case, however, is that (as the law regards such publications at present) the relevant acts took place in this jurisdiction. That is to say, the act is completed when the words are down-loaded to computers in England and Wales.

42. A closely allied point put forward by Mr Price was that the downloading in England was not something that was authorised by Mr Lennox Lewis or, for that matter, by Mr Burstein. He submits that authorisation has to be seen in terms of agency, and it would be absurd to suggest that any of his clients were in such a relationship with any of the relevant persons in this jurisdiction who down-loaded or read the offending words. It is not enough, says Mr Price, merely to "facilitate" the ultimate act of downloading. I am by no means persuaded that authorisation, in the context of publication, has to be seen in terms of agency. It may be true that someone who gives an interview to a newspaper is not thereby creating the editor his agent or in any way binding the editor to publish the interview. He is nonetheless authorising the use of the information he provides and, to that extent, the law would regard him as responsible if a defamation is published as a result. Mr Price may no doubt wish to develop these arguments at trial, with particular reference to the way in which the law approaches internet publication, but the Claimant's case is that Mr Burstein caused the ultimate publications in England by virtue of having said what he did to fightnews.com and boxingtalk.com. That is plainly an arguable case in the context of the present application.

43. As I indicated at the close of the hearing, I am quite satisfied in the light of all these considerations that this is a claim which should be permitted to go forward in this jurisdiction and, accordingly, I decline to set aside the Master's Order.