



Neutral Citation Number: [2008] EWHC 3135 (QB)

Case No: HQ08X00896
& HQ08X00875

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2008

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

JOHN ALEXIS MARDAS	<u>Claimant</u>
- and -	
NEW YORK TIMES COMPANY	<u>Defendant</u>

and between:

JOHN ALEXIS MARDAS	<u>Claimant</u>
-and-	
INTERNATIONAL HERALD TRIBUNE SAS	<u>Defendant</u>

Desmond Browne QC and Victoria Jolliffe (instructed by Stockler Brunton) for the
Claimant
Geoffrey Robertson QC and Guy Vassall-Adams (instructed by Finers Stephens Innocent)
for the Defendants

Hearing date: 21 November 2008

Judgment

Mr Justice Eady :

1. There are now two actions before the court (HQ08X00896 and HQ08X00875). They are claims brought by Mr John Alexis Mardas against, respectively, the New York Times Company and the International Herald Tribune SAS. He alleges that defamatory articles were published within this jurisdiction, both in hard copy and on line.
2. Despite an admission in its defence, International Herald Tribune now denies that any publication took place in this jurisdiction by way of hard copy. It has been explained in evidence that the original admission was made in error. It is admitted that publication occurred on line and, what is more, it continues to this day.
3. The Master struck out both actions on 10 June 2008. Permission to appeal was granted by Sir Charles Gray on 10 August 2008. The Master founded his decision on case management considerations, lack of proportionality and the decision of the Court of Appeal in *Jameel (Yousef) v Dow Jones Co Inc* [2005] QB 946.
4. Both actions concern the publication on 7 February 2008 of an article by Allan Kozinn under the heading “Meditation on the Man Who Saved the Beatles”. The words complained of are as follows:

“The Beatles’ first encounter with the Maharishi was at a lecture in London, not long after the release of ‘Sgt Pepper’ ... At the time the Beatles, especially Lennon and Harrison, were still trying to tap into the cosmic subconscious, or eternity, or whatever, by using LSD. The Maharishi’s transcendental meditation techniques promised to get them there without the chemicals. They agreed to attend a retreat in Bangor, Wales, at the end of that August, and it was during the retreat that they learned that Brian Epstein, their manager, had died of a drug overdose.

The Maharishi helped them through the shock with Hindu philosophy about the continuing life of the soul, and a few months later, in February 1968, the Beatles flew to Rishikesh to devote themselves fully to his instruction. Also there at the time were Mike Love of the Beach Boys, Donovan and the actress Mia Farrow and her sister Prudence (immortalised in a Beatles from the same batch as ‘Sexy Sadie’.

Ringo Starr left after the first week, saying he was unable to eat spicy food. Mr McCartney left about three weeks later, and Lennon and Harrison left about two weeks after that, after hearing rumours that the Maharishi had made sexual advances to one of the women in the ashram. Lennon, as the group’s designated defiant loudmouth, went to the Maharishi and said ‘We’re leaving’, adding only – as he reported the story in interviews – ‘If you’re so cosmic, you’ll know why’.

In the years since Lennon's death, in 1980, Harrison and Mr McCartney reconsidered the accusations against the Maharishi. Mr McCartney has noted that the rumours of sexual impropriety were raised by Alexis Mardas, a supposed inventor and charlatan who had become a Beatles insider. 'Magic Alex', as he was known, had agendas of his own, and may have fabricated (or at least exaggerated) the story. (Mr Mardas has never commented on the incident.) During the 1990s both Harrison and Mr McCartney were suitably convinced of the Maharishi's innocence that they reconciled with him and offered apologies ...

Meanwhile you have to wonder whether the Beatles' future might have played out differently if Magic Alex hadn't been in Rishikesh to spread rumours about the Maharishi. Instead of unravelling, as they did during the White Album sessions and throughout 1969, maybe meditation would have left them so prolific and contented that they'd have continued together, releasing a double album every six months or so."

5. The natural and ordinary meanings are pleaded as follows:
 - i) the Claimant was a conman and trickster who had falsely claimed to be an inventor;
 - ii) the Claimant, for his own personal interests and advantage, had made up and spread false allegations that the Maharishi had made sexual advances to one of the women in the ashram;
 - iii) had the Claimant not made up and spread the rumours about the Maharishi, the Beatles might well have continued together as a group for longer than they did and produced many more recordings.

6. In the New York Times action the application was issued on 8 May of this year seeking orders to the effect that:
 - i) the court should not exercise its jurisdiction to try the claim;
 - ii) the court should set aside the claim form and dismiss the action; alternatively
 - iii) the proceedings should be stayed generally; or
 - iv) the action should be struck out as having no realistic prospect of success and/or as an abuse of the process of the court.

Reliance is placed on CPR Parts 1, 3, 11 and 24.

7. The application in the International Herald Tribune action was issued on 4 June, shortly before the application in the New York Times case was due to be heard before the Master. Reliance was placed in this instance on CPR Parts 1, 3 and 24.

8. So far as the International Herald Tribune was concerned, the Master decided that there was no realistic prospect of establishing that there had been publication of the offending words in hard copy. What he said was this:

“8. I have come to the conclusion in this case, and am satisfied, that the claimant stands no real prospect of success in establishing that there was a hard copy publication in the International Herald Tribune.

9. On the one hand, there is evidence from Mr Stockler, the claimant’s solicitor, signing a statement of truth on the particulars of claim saying it was published. On the other hand, there is extensive evidence from the International Herald Tribune, and in particular Mr Marino, that it was never published at all. It is true that there are potential holes to be picked in some of the evidence that Mr Marino gives. He exhibits front pages only of newspapers, he exhibits front of newspapers which plainly were for sale in France, not in England, but what is clear from Mr Marino’s evidence, not the real evidence of the newspapers, but nevertheless sufficiently real evidence from Mr Marino himself, is that this article never appeared in the newspaper itself.

10. If evidence is needed to support that then, on the following day, there was a ‘flagging’, as it is called, of the article on the Internet – in other words, what I infer is being said editorially is, ‘If you are interested in reading about the Maharishi’, because the article was, as I have said, following the death of the Maharishi, ‘you might like to look at the article that is published on our website’.”

9. As to the availability of the International Herald Tribune on line, the Master found that there were only about 27 hits. On the other hand, his conclusion in relation to the New York Times was that there were only four hits from England on the Internet publication, whereas there had been published approximately 177 hard copies.

10. On the basis of these findings of fact, which were by no means uncontested, the Master went on to conclude that the litigation represented an abuse of process. He expressed his conclusion as follows:

“21. When I look to see what would be taken up by this case in terms of money, in terms of costs, in terms of what is at stake, in terms of proportionality, and above all, I am bound to say, in terms of the court’s resources, tying up twelve good men and true in a jury for four or five weeks possibly, and a court and a judge, to decide whether damages should be awarded and, if so, what damages should be awarded to a

claimant in respect of matters that happened 40 years ago in respect of publication to, at most, a couple of hundred people, and probably not even that many, on the evidence before me I have come to the conclusion that these claims are an abuse of process and should be struck out, and I shall so order.”

11. In granting permission to appeal, Sir Charles Gray made the following succinct observations:

“ ... The contested questions as to the number of hard copy issues and Internet hits cannot be resolved on an application such as the present one.

Jameel v Dow Jones is authority for the proposition that a libel action may be struck out as an abuse of the process where the evidence is that the extent of publication within the jurisdiction is very small. Is there a real prospect that the Applicant would be able to satisfy the court that this is not such a case? In my judgment such a real prospect exists in the circumstances of this case. I think the instant cases are distinguishable on their facts from both *Jameel* and *Kroch v Rossell* [reported at [1937] 1 All ER 725], on both of which the Master placed reliance in his judgment. In my view it is at least arguable that the Applicant has a reputation in this country which he is entitled to seek to vindicate. I do not think it can be said that this is a case of forum shopping.

The concern of the Master about what he described as the monumental costs of these actions is understandable. However, I consider it to be well arguable that such considerations do not generally of themselves justify the striking out of actions as an abuse. I do not understand *Schellenberg v BBC* [reported at [2000] EMLR 296] to establish the contrary; it was a decision on its own unusual facts. Besides it is clearly arguable that concerns about disproportionate costs are best met by suitable case management rather than by peremptory striking out.”

It might be thought that those reasons, so clearly expressed, provide a sufficient basis on which to allow the appeal. In fairness, however, to the Respondents it is appropriate to address the grounds of appeal somewhat more fully. They are set out in considerable detail, running to approximately five pages in respect of each appeal (although, of course, there is considerable overlap).

12. First, Mr Browne QC relies upon the irrebuttable presumption in English law that the publication of a defamatory article causes damage to the reputation of the person defamed. It was held in the *Jameel* case, cited above, that there was nothing incompatible in this presumption with the values enshrined in Article 10 of the European Convention on Human Rights and Fundamental Freedoms. Accordingly, it will only be in rare cases that it is appropriate to strike out an action as an abuse on the ground that the claimant’s reputation has suffered only minimal damage and/or

that there has been no real and substantial tort within the jurisdiction: see e.g. the remarks of Sedley LJ in *Steinberg v Pritchard Englefield* [2005] EWCA Civ 288.

13. It is necessary to remember that both generally and in its application to specific cases the law of defamation is concerned to strike a balance between freedom of information, on the one hand, and the protection of the honour and reputations of individual citizens on the other hand. The right to protect reputation is expressly recognised in Article 10(2). Furthermore, it is increasingly being recognised in the Strasbourg jurisprudence that the right to protect one's honour and reputation is to be treated as falling within the protection of Article 8: see e.g. *Radio France v France* (2005) 40 EHRR 29 and *Pfeifer v Austria* (App. No. 12556/03), 15 November 2007, at [35] and [38]. It is thus obvious that care must be taken on applications of this kind not to deprive a litigant too readily of his Article 6 right of unimpeded access to the courts in pursuit of his remedies.
14. Criticism is levelled at the Master's decision on the scale of publication, not only as to his willingness to make findings of fact on contested evidence, but also because he was too ready (even on his own findings as to the number of hits on the websites and the number of hard copy publications of the New York Times) to come to the conclusion that there had been no real or substantial tort – or, as he put it, that “the game was not worth the candle”. It is true that this phrase was adopted by the Court of Appeal in the *Jameel* case, but it is necessary to remember that this was in a context where it was held that (a) there were only five hits, of which three had been from the claimant's legal team, and (b) there was no realistic prospect of achieving vindication in any event.
15. What matters is whether there has been a real and substantial tort within the jurisdiction (or, at this stage, arguably so). This cannot depend upon a numbers game, with the court fixing an arbitrary minimum according to the facts of the case. In *Shevill v Presse Alliance* [1996] AC 959, it was thought that there had been a total of some 250 copies of the French newspaper published within the jurisdiction, of which only five were in Yorkshire where Ms Shevill lived and was most likely to be known. She was permitted to seek her remedies here.
16. The article complained of in the present case has remained on the Defendants' respective websites to this very day. That fact naturally gives rise at least to a possible inference that there has been a continuing, albeit modest, readership. My attention was drawn in this context to the remarks of Lord Phillips MR (as he then was) in *Loutchansky v Times Newspapers Ltd* [2002] QB 783, 817D at [72]:

“ ... If the defendants were exposed to liability ... they had only themselves to blame for persisting in retaining the offending articles on their website without qualifying these in any way.”
17. It is also pertinent to have in mind the remarks of Callinan J in the High Court of Australia in *Gutnick v Dow Jones* [2002] HCA 56 at [181] and [192] to the following effect:

“A publisher, particularly one carrying on the business of publishing, does not act to put matter on the Internet in order

for it to reach a small target. It is its ubiquity which is one of the main attractions to users of it. And any person who gains access to the Internet does so by taking an initiative to gain access to it in a manner analogous to the purchase or other acquisition of a newspaper, in order to read it.

...

If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage.”

This approach has also been adopted in a number of the decisions in this jurisdiction and, in particular, by the Court of Appeal in *King v Lewis* [2005] EMLR 45 at [29].

18. In judging in any given case whether there has been a real and substantial tort, in respect of which a particular claimant should be allowed to seek his remedies by way of vindication, it may sometimes be relevant to consider the attitude taken by the relevant defendant. In the present case, Mr Browne places reliance upon the fact that in the International Herald Tribune action a defence has been entered which seeks to justify the proposition that the Claimant is a “charlatan”. He argues that it is singularly inappropriate to strike out an action once a plea of that kind has been put on the record. The Claimant should have a chance to meet it. It is a relevant consideration in determining whether there is any purpose to be served in his pursuing vindication (a point addressed by the Court of Appeal in the *Jameel* case).
19. Detailed submissions have been made to illustrate the extent of the dispute between the parties over the scale of publication, in each case, and the undesirability of a court coming to a summary conclusion in such circumstances.
20. I shall consider first the evidence as to publication of the New York Times. The Master was told that the article was published in this jurisdiction in only three forms:
 - i) the distribution of “upscale fax” copies of the print edition;
 - ii) distribution of what is called a “Newspaperdirect” version of the print edition;
 - iii) via the New York Times website.
21. The evidence of Mr McCraw assessed the number of “upscale fax” copies at 140, whereas he put the “Newspaperdirect” versions at only 30. He also estimated that no more than four people in the United Kingdom (obviously in itself somewhat wider than this jurisdiction) downloaded the article from the website. The Claimant’s advisers do not accept this evidence as necessarily reliable. They would wish to test it with the benefit of disclosure.
22. It is the Claimant’s case that the print edition is published within this jurisdiction in another form, known as the “electronic edition”, which is available to subscribers and to those who have taken up the offer of a free trial. The service would enable readers to download to their computer an exact replica of each day’s newspaper. The cost is

said to be no more than \$14.99 per month, which compares very favourably with the cost of a printed newspaper in the United Kingdom (namely \$10). Those who are interested in reading the newspaper regularly would, for this reason, be more likely to acquire it in the electronic form. Further information was sought about this method of publication. Evidence has now been introduced by the Defendant to show that there were 75 such subscribers in the jurisdiction but that none of them accessed the relevant part of the paper. That is a matter the Claimant will also no doubt wish to test before conceding it.

23. Mr Browne also submits that it is significant that “Newspaperdirect” copies are distributed to hotels, and thus made available to a number of potential readers.
24. Against this background, the Claimant is not prepared to accept that the number of copies of the print version published within this jurisdiction was confined to 177.
25. I am quite satisfied that it was inappropriate for a finding of fact to be made on the scale of publication on the basis of incomplete evidence. It is a matter which should be left to trial. Furthermore, and in any event, even if the publications were confined to the Defendant’s figure, there was no basis for concluding that there was no real and substantial tort.
26. The Claimant’s legal advisers also take issue with the method of calculating the access to the article via the website. They argue, for example, that another method of calculation should have been adopted which would result in a possible total of 313 hits on the article within the United Kingdom. This would have involved calculating the percentage of visitors to the website from the United Kingdom accessing the music section as a fraction of the percentage of all visitors who accessed that section. I cannot possibly, at this stage, conclude that that is the right way or the only way of making the necessary calculation. What is apparent, however, is that this cannot be determined until trial, if necessary with the assistance of expert evidence.
27. I turn now to the International Herald Tribune. It may well be that, in due course, the court will be satisfied that no hard copies of this newspaper were published within the jurisdiction. It is not surprising that the Master found the evidence adduced on the Defendant’s behalf in this respect impressive. Again, however, it is difficult to see how he could finally resolve the issue on the conflicting evidence as it then stood.
28. It seems that on the evening of 8 February of this year the Claimant’s solicitor, Mr Stockler, was told by his wife (who happens to be American) that she had seen the offending article in a hard copy of the International Herald Tribune on the previous day. It will be her evidence, apparently, that she reads the newspaper every day between Monday and Friday. It is suggested, as a matter of speculation, that she may be mistaken in thinking that she saw the article in the International Herald Tribune, when it may have been that she spotted it in the New York Times. That is not a matter apt for determination on a summary basis.
29. There is other evidence on this issue. For example, a friend of the Claimant apparently read the article in a printed edition of the newspaper in Athens. The significance placed upon this evidence by the Claimant’s advisers is that, at least, it could refute the evidence of Mr Marino that it was *nowhere* published in printed form. Accordingly, they wish to have the benefit of full disclosure and such further

information as may be appropriate. It is difficult to see how the court can refuse that opportunity.

30. The Claimant does not accept, either, that the estimate of 27 hits on the article via the International Herald Tribune website can be relied upon. Evidence from Mr Schattenberg was served on his advisers very shortly before the hearing, so that there was no opportunity to investigate or deal with the material in time. It is again hard to resist the submission that the matter cannot properly be resolved at least until disclosure has taken place.
31. The International Herald Tribune argues that “ ... there is no necessity to put the Defendants to these costs when the simple answer appears to be that a few dozen people have accessed the article on the IHT website to this date”. A few dozen is enough to found a cause of action here, although the damages would be likely to be modest.
32. I can understand that investigating the scale of publication further could be very expensive. If this has to be carried out and yields no evidence of a wider readership than the two Defendants currently admit, then it may well be that the Claimant will have to bear the cost of it – which will almost certainly exceed any sum awarded in damages. That is a risk he will have to take.
33. More generally, I can also understand the Master’s dismay at the cost and effort likely to be involved in a full scale trial of the issues in this case. As he pointed out, the events took place a long time ago and with the passage of time there may be difficulties in obtaining the evidence that would be required for a definitive outcome. The fact remains, however, that allegations of charlatanism and of lying cannot be dismissed as trivial. Moreover, even if defamatory allegations do relate to events of long ago, that cannot be a ground in itself for refusing access to justice: see e.g. *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637, HL. The author clearly thought the allegations to be of topical interest to the readers.
34. As to the Master’s other concerns, Mr Browne invited my attention to the comments of Thomas LJ in *Aldi Stores Ltd v WSB Group Plc* [2007] EWCA Civ 1260 at [24]:

“I do not see how the mere fact that this action may require a trial and hence take up judicial time (which could have been saved if Aldi had exercised its right to bring an action in a different way) can make the action impermissible. If an action can be properly brought, it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim (for which he in any event pays under the system which operates in England and Wales) on the basis that he could have acted differently and so made more efficient use of the court’s resources. ... The problems which have arisen in this case should have been dealt with through case management.”
35. It is plainly desirable that some sensible accommodation should be reached, so as to avoid a time-consuming and expensive trial, but that is in the hands of the parties. I am satisfied that the circumstances here cannot be characterised as an abuse of

process: nor can it be said that it is appropriate to come to a conclusion on the merits of the litigation, at this early stage, on the basis that a jury would be perverse to resolve the contested issues of fact in the Claimant's favour or to find that he has been defamed.

36. Reliance is placed by the author, in recently introduced evidence, upon the fact that others have made similar allegations in the past in, for example, "authoritative" biographies and autobiographies. While I can understand his frustration, if this is so, it is irrelevant as a matter of English law, since it would not be admissible either on liability or in mitigation of damages: *Associated Newspapers Ltd v Dingle* [1964] AC 371, 395 (Lord Radcliffe), 405-6 (Lord Cohen), 410 (Lord Denning), 416-7 (Lord Morris).
37. It may well be that in due course international agreement will be reached as to the appropriate way of resolving claims arising out of Internet publication. That is plainly desirable. For the time being, however, courts are obliged to apply the law as it stands.
38. There can be little doubt that if Mr Mardas succeeds in establishing that he has been libelled here, and a real and substantial tort thus committed within the jurisdiction, he is entitled to bring proceedings: see e.g. *Berezovsky v Michaels* [2000] 1 WLR 1004 and *Shevill v Presse Alliance*, cited above. Thus, although it is fashionable to rail against "libel tourism", there is no reason in law why the courts of England and Wales should decline jurisdiction. Although the Claimant is now resident in Greece (within the European Union), he is well known in this jurisdiction and lived here, I understand, from 1963 to 1996. Also, he has two children who live here and have British nationality. There is no artificiality about seeking to protect his reputation within this country, as he has done in other litigation (apparently relating to different allegations) in the past. I, like Sir Charles Gray, do not believe that this can be characterised as a case of forum shopping.
39. The Defendant's advisers state, accurately, that he has not sued either in the United States or in France over these allegations, where there was wider circulation, but that is beside the point. English law permits him to claim whatever is appropriate compensation and vindication in respect of the smaller local publication here. The approach has long been to recognise that where a tort has been committed the appropriate forum will usually be that of the jurisdiction where it took place. What he cannot do is to claim damages here in respect of (say) publications in the United States.
40. Accordingly, it seems to me to be clear that in the respects I have identified the Master erred in law and that the appeals must therefore be allowed.