Neutral Citation Number: [2011] EWHC 3232 (QB)

Case No: HQ09D04378

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2011

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

DEAN McKEOWN **Claimant**

- and -

ATTHERACES LIMITED **Defendant**

- -
- -

Ian Winter QC and **Andrew Monson** (instructed by **Stewart-Moore Solicitors**) for the **Claimant**
Mark Warby QC and **Catrin Evans** (instructed by **Farrer & Co LLP**) for the **Defendant**

Hearing date: 28 November 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. In this libel action the Claimant Mr Dean McKeown sues Attheraces Ltd, which operates a specialist TV channel devoted to horse racing. The words complained of appeared in an interview between the Claimant and a presenter, Mr Sean Boyce, broadcast live on 5 November 2008. The same broadcast was accessible for viewing online until an unknown date in March 2009. It is said that the words complained of bore the following meanings:

   i) On many occasions over the past four or five years the Claimant has, or clearly appears to have, employed the tactic of only pretending to hit his horse, or other similar kinds of tactic designed to stop his horse surreptitiously, and he has thereby cheated the racing public on many occasions over the past four or five years, or at least there are reasonable grounds to suspect that he has done so;

   ii) In his most recent ride on RASCAL IN THE MIX [on 4 November 2008] the Claimant had made no effort to ask the filly to jump out of the stalls or get her into contention for the race because his dishonest objective was to prevent the horse from doing her best, or at least there are reasonable grounds to suspect that this was his objective; and

   iii) The Claimant's motive in stopping RASCAL IN THE MIX was probably to honour a corrupt bargain with some people who had layed the horse at long odds of 20/1, whereby he ensured that their otherwise extremely risky lay bets would be successful in exchange for a financial kickback, or at least there are reasonable grounds to suspect that this was his motive.

2. It is unnecessary to go into the background in detail. It will suffice to record that the interview took place on the day following Mr McKeown's ride at Southwell on RASCAL IN THE MIX. On that occasion, the Stewards of the British Horseracing Authority ("BHA") found him guilty of deliberately failing to ride the horse on its merits. Only a few weeks earlier, the Disciplinary Panel of the BHA, following a six day inquiry, had found him guilty of the same "offence" on four occasions between 16 June 2004 and 19 December 2005. This was held to be part of a conspiracy to commit a corrupt or fraudulent practice. These events formed the immediate background to Mr Boyce's interview.

3. In due course, a BHA appeal board dismissed his appeal against the Panel's findings and a judicial review claim was also dismissed (subject to one issue being remitted to the Panel, on which Mr McKeown was again unsuccessful).

4. So far, defences have been raised of justification, fair comment and statutory reporting privilege. The case was considered by Tugendhat J on 20 and 21 January of this year, following which he refused to grant summary judgment to the Defendant. It had been argued before him that the Defendant was bound to succeed in one or other or both of its defences of qualified privilege and honest comment. It was also argued, in the alternative, that there was no complaint of a "real and substantial tort" and that the proceedings represented an abuse of the process of the court in accordance with the doctrine explained in *Jameel (Yousef) v Dow Jones Inc* [2005] QB 946 and/or that the Claimant had no reputation worth vindicating at the time of publication. A further

abuse argument was raised, to the effect that the Claimant was seeking to re-litigate issues which had been finally determined on their merits against him.

5. After those arguments were rejected, as Mr Warby QC explained, tactics were reconsidered and it was decided to seek to re-amend the defence in order to supplement the particulars of justification but, more significantly, to add a plea of *Reynolds* privilege. There is also a proposed amendment, in relation to damage, on the basis of "general bad reputation". The matter came before me on 28 November 2011 with the purpose of determining whether permission should be granted for those proposed re-amendments. Furthermore, I was asked to rule that there should be a preliminary issue relating to the *Reynolds* defence and other forms of privilege pleaded.

6. A further matter raised was mode of trial. It had been ordered by consent by Tugendhat J on 7 February that there should be trial by judge and jury. Mr Warby now seeks to have that order set aside on the basis that an application for jury trial was not made within 28 days of the service of the defence in accordance with CPR 26.11 and that, accordingly, it is necessary for a judge to consider whether there should be jury trial in accordance with the discretion contemplated under s.69(3) of the Senior Courts Act 1981. When that discretion falls to be exercised, there is a presumption in favour of trial by judge alone. The so-called "right" to jury trial, as contemplated by s.69(1) of the Act, only comes into play if an application has been made within the relevant 28 day period, as required by CPR 26.11: see *Thornton v Telegraph Media Group Ltd* [2011] EMLR 29. In such circumstances, there is a presumption the other way, unless and until one or more of the specified statutory criteria has been satisfied.

7. Alternatively, Mr Warby argues that the criteria under s.69(1) are fulfilled, in any event, since the trial will involve prolonged examination of documents, such that it cannot be conveniently carried out with a jury. If he is right about that, he goes on to submit that there is no reason why the court's residual discretion should be exercised in favour of jury trial.

8. Mr Winter QC on behalf of the Claimant, on the other hand, argues that although the defence was served in May of last year, it was not filed in accordance with the rules until 30 July of that year. Accordingly, all that was served in May was a draft defence. The obligation is to serve a copy of the defence, as filed, and accordingly the 28 day time period has never expired. In the meantime, however, an application was made on 19 August 2010 for jury trial. He argues, further, that the case would not involve prolonged examination of documents and that there is correspondingly a presumption in favour of jury trial in accordance with s.69(1) of the Act.

9. As the matter currently stands, the case is listed for trial commencing on 27 February 2012 with an estimate of 15 days.

10. I shall deal first with the application for permission to re-amend the defence. This is not really opposed, since Mr Winter realistically recognises that *Reynolds* privilege is at least arguable. He has characterised it as "weak" and asks rhetorically why, if it is truly viable, it was not deployed at the outset. Nonetheless, at this stage, all he seeks to do is to impose conditions on the grant of permission. In particular, he asks that the Defendant should be put to its election and choose the *Reynolds* defence in

substitution for the defences already pleaded. This is a novel approach. If the proposed defence is arguable, it seems to me to be right in principle to allow it to go forward. There may, of course, be good case management or other reasons for excluding, or limiting the scope of, some other defence. But any such argument must be addressed independently on its own merits.

11. Mr Warby does not accept that the adoption of a *Reynolds* defence connotes, on his client's part, any acknowledgment of the weakness of the pre-existing defences. He wishes to run them in harness. He emphasises that the judgment of Tugendhat J of 7 February did not fatally undermine justification, fair comment or statutory privilege. All the learned Judge found was that there was no sufficient basis to justify granting the Defendant summary judgment.

12. I shall accordingly grant permission for the amendments sought.

13. The next issue is mode of trial. As I have already made clear, CPR 26.11 defines the need to apply for jury trial by reference to a period of 28 days after service. It does not refer to "filing". It has not been suggested that the original service of the defence, in May 2010, was ineffective or (Mr Warby's *reductio ad absurdum*) that it left room for an application for judgment in default of defence. It has been treated as effective service ever since. No complaint was ever made about it. Accordingly, it seems to me to be clear that the relevant statutory provision for me to consider is that of s.69(3), where the presumption is in favour of trial by judge alone. This appears to accord with the judgments of the Court of Appeal in *Thornton*. I shall, however, address the alternative argument based on prolonged examination of documents.

14. I am quite satisfied that there is going to be a need for prolonged examination of documents. One of the particular examples to which counsel drew attention was the film recordings (now digitised) of the various rides pleaded in the defence. It is necessary to have regard to these in some detail, as was explained by Stadlen J in relation to his own experience when preparing his judgment in earlier judicial review proceedings: *McKeown v British Horseracing Authority* [2010] EWHC 508 (QB), 12 March 2010, at [196]-[198]. Leaving aside any practical difficulty there may be, or any substantial additional cost in arranging for a jury to view such material in court, it seems to me to be quite clear that prolonged examination is going to be required with the need to slow down and analyse parts of each ride "frame by frame".

15. It took Stadlen J, I understand, just over a day to carry out this exercise, although there are now some additional rides to be considered. It is true that he felt obliged to take notes during the viewings, but it is necessary always to remember that with a jury of twelve people allowance has to be made for the impression made on each of the individuals. It may be necessary for some to see a particular part of the film over again, whereas others would not need to do so. There is also the familiar practical problem of having to go "at the pace of the slowest".

16. In addition, a jury would have to address substantial detailed "timeline" evidence about telephonic communications between various individuals alleged to have been involved in a conspiracy. This too requires careful thought and analysis and I am satisfied that the criterion of "prolonged examination of documents" is again fulfilled. Of course, I accept that juries often have to look at such material in criminal cases, but in the context of s.69(1) of the 1981 Act I am concerned with how "convenient" the

process would be when conducted with a jury, as compared to the same process taking place before a judge sitting alone.

17. Further, there is a list contained in the witness statement of Mr Michael Patrick of the categories of documents considered by the BHA Panel in 2008. It is intended to retrace the steps taken on that occasion to make good the defence. This all tends to confirm how prolonged and inconvenient that process would be with a jury. Much of the material is quite technical and the exercise has to be carried out in relation to each of the races pleaded. It is to be noted that the hearing before the Panel took six days and that before Stadlen J some five days. Once it is explained, it is probably true to say that most of the material is not difficult to grasp. But there is a good deal of it and the main problem is likely to be the need for constant cross-referring in order to follow the expert analysis.

18. I need next, therefore, to consider whether a residual discretion should be exercised in favour of jury trial notwithstanding the need for prolonged examination. I only recall exercising the discretion in such circumstances once before – in July 1999 in the case of *McPhilemy v Times Newspapers Ltd*. Whether I made the right decision is now difficult to tell, and it matters not. Mr Winter places particular reliance upon the fact that Mr McKeown is a well known public figure (at least in racing circles) and that this is a factor which sometimes militates in favour of jury trial. Nevertheless, it seems to me that a number of other factors weigh more powerfully against.

19. In particular, Mr Warby placed reliance on the need for a reasoned judgment. This is always an advantage, since it renders it easier for one party or the other to go to the Court of Appeal if dissatisfied with the outcome. It is much more difficult to appeal a jury's verdict. Transparency has a particular significance in the present case, because a jury verdict in Mr McKeown's favour would appear to contradict, to a greater or lesser extent, earlier findings or decisions. That may be the outcome of the case in due course, whatever the mode of trial, but it is much more satisfactory if the process which led to the different conclusion, and the extent to which there is truly any inconsistency, can be assessed openly by reference to a judge's reasons.

20. I have come to the conclusion, whether I am to exercise a discretion under s.69(1) or under s.69(3) of the 1981 Act, that I can detect no significant reason for preferring jury trial over trial by judge alone. The latter mode of trial would undoubtedly be more speedy, less expensive and more transparent as to its outcome.

21. The third issue I have to resolve is whether or not there should be a preliminary hearing to dispose of all privilege defences in advance of trial. Experience shows that the attraction of preliminary issues, or separate trials, can often be a snare and delusion. Indeed, Mr Winter points to the unsuccessful attempt in this case to save costs by seeking early rulings over a two day hearing in January. Yet Mr Warby has cited a number of examples where *Reynolds* privilege has been determined as a distinct issue and he says that there is a relatively high success rate, in the sense of disposing of cases earlier and less expensively. Each case must obviously turn on its own facts. If this Defendant succeeds completely on privilege, of course, that would be the end of the matter and time would undoubtedly be saved. In the event, however, that the Claimant succeeds on privilege, wholly or in part, there would be no saving of costs and indeed there may be some duplication. This was an issue which was hotly disputed between counsel. Mr Winter contends that there would be, inevitably,

considerable overlap in issues and thus duplication of evidence. Furthermore, he regards it as unfair that Mr Boyce should be given a "dry run" at cross-examination and an opportunity to prepare his answers more effectively second time round.

22. It is fair to point out, since I have held that there should be trial by judge alone, that there would be rather more scope for avoiding duplication than if the main trial involved a jury. The judge who had heard any preliminary issue would be able to indicate areas which would not require further exploration at trial.

23. Furthermore, Mr Warby takes the point that Mr Boyce is a witness for the purposes of *Reynolds* privilege but not for justification. There should be no need for duplication in his case, therefore, and by the same token there would be no question of his taking advantage of a dummy run.

24. One of the difficulties, which seems to me significant, is that it would be necessary to go through evidence in considerable detail for the purposes of *Reynolds* privilege and then again for fair comment and/or justification. It is true that the objective would be different in each case. In considering, for example, the footage of the various rides, the court would be looking in the context of *Reynolds* privilege to test the reasonableness of Mr Boyce's beliefs and whether his behaviour was responsible. On the other hand, in the context of justification and/or fair comment, the objective would be to establish what actually happened.

25. Mr Winter makes the point also that the defence of statutory reporting privilege is being partly run in tandem with that of fair comment. There would thus be no advantage in having the former tried as a preliminary issue, since if it were to succeed there would still remain the question of whether there was recognisable comment in the interview upon the *ex hypothesi* privileged material. The preliminary issues, being confined to privilege, would leave that outstanding.

26. Mr Warby sought to address this argument by suggesting that the issue of comment could also be brought forward and put on the agenda for resolution by way of preliminary issue. Even if this were done, however, I cannot be confident that it would achieve any significant savings. The issues would be too fragmented. So much depends on how much of the interview could be characterised as a "report" and then how much of it could be said to be "comment" on the "report(s)".

27. More generally, issues of *Reynolds* privilege cannot be determined in a vacuum. When judging reasonableness and responsibility, it is necessary for a judge to understand the factual context in which the relevant conduct occurred. Otherwise, in Mr Winter's phrase, "the court would be proceeding in blinkers".

28. Mr Winter submits that much of the lay and expert evidence which Mr McKeown wishes to deploy in rebutting the defence of justification would also be relevant to the preliminary issues on privilege. It is apparent from paragraph 8A.8 of the proposed re-amended defence that the Defendant is relying on a good deal of historical race material for the purpose, ultimately, of judging the reasonableness of Mr Boyce's interview technique and the "responsibility" of his journalism. It is difficult to see, therefore, why the recordings of the relevant rides, and the expert evidence relating to them, should not be admitted for the purpose of *Reynolds* privilege. The facts relied upon and Mr Boyce's interpretation of them are contentious matters. The underlying

evidence about the rides in question has to be closely examined. The risk of duplication would thus be substantial. Early resolution of privilege issues may be sensible in situations where the facts are not in dispute. This is plainly not such a case.

29. It seems to me also that there is room for considerable overlap in determining justification on the basis of "reasonable grounds to suspect", on the one hand, and reasonableness of belief for the purposes of *Reynolds* privilege, on the other.

30. Looking at the matter as an exercise in case management, and in seeking to achieve the overriding objective of the CPR, I am unpersuaded by the evidence in this case that there are likely to be significant savings either of time or money if the issues of privilege are hived off and tried separately. Indeed, I think it would be difficult to avoid duplication. The case does not lend itself to easy compartmentalising.

31. I have come to the conclusion, in all the circumstances, that there would be no clear advantage in directing a preliminary issue in this case. It is in the interests of all concerned that a trial should now take place of all the issues together.

32. Accordingly, the Defendant succeeds on the application for permission to re-amend the defence and upon mode of trial, but I reject the application for a preliminary issue.