Neutral Citation Number: [2009] EWHC 1925 (QB)

Case No: HQ08X03302

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 31st July 2009

Before :

Before His Honour Judge Moloney QC
(Sitting as a Judge of the High Court)

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Between :

1. MARK McLAUGHLIN	**Claimants**
2. GREG MARTIN	
3. JIM DAVIES	
- and -	
JEFF NEWALL	**Defendant**

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- -

Mr Justin Rushbrooke (instructed by Carter-Ruck) for the **Claimant**
Mr Jonathan Barnes (instructed by Freeth Cartwright) for the **Defendant**

Hearing date: 23rd July 2009

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Judgment

A. Introduction

1. This Judgment relates to an Application Notice dated 5 June 2009, issued by the Claimants in a defamation action, which seeks to strike out from the Defence, pursuant to CPR 3.4(2) a. and/or b. and/or the inherent jurisdiction, those parts of the Defence which rely on the proposition that the claim is barred by a legally-binding compromise agreement entered into by the parties through their solicitors before the proceedings were issued. The application has two main alternative grounds, both relating to a reference in the agreement to the provision by the Defendant of "a written apology and retraction in terms to be agreed". In briefest summary, they are:
Ground 1. that by reason of that provision, no binding contract can have been entered into, because agreement was never reached on an essential term, namely the actual wording of the apology and retraction, or at least such agreement was a condition precedent to the Claimants' becoming barred from suing;
Ground 2. that even if there is here a binding contract, the Defendant is precluded from relying on it by reason of the fact that he has subsequently served a Defence including a plea of justification, which is inconsistent with any possibility of a future sincere apology.

B. Factual Background

2. Although this application is primarily concerned with the contractual and legal issues summarised above, it is necessary to understand the nature of the underlying dispute which was the subject of the apparent compromise. The Defendant is Head of Programmes at the University of Derby and a Fellow of the Chartered Institute of Personnel and Development. His daughter was, in 2006, a newly-qualified teacher who worked for a short time at the Durand Primary School in Stockwell, South London. The reasons for her departure are not for me to consider on this application; suffice it to say that it led to a serious dispute between Ms Newall and her father, on the one hand, and the management of the School on the other. The Claimants in this action are respectively the present Head Teacher of the School, his predecessor who was Head Teacher in 2006 at the time of Ms Newall's short presence there, and the Chair of Governors at all material times.

3. In the course of that dispute, the Defendant during 2007 wrote a series of letters critical of the School, not only in relation to its treatment of his daughter but more generally. Those letters were mostly sent to persons having some apparent connection with the dispute, but it is also alleged that he was responsible for one item which was circulated more widely on the website of the Lambeth branch of the National Union of Teachers. (I am not here addressing the merits of any claim to qualified privilege which may fall to be decided in due course; but the extent and nature of the defamatory publications complained of may have some relevance to the issue before me, of whether and to what extent an apology was an essential element of any settlement of this particular libel case.)

4. As appears from their Amended Particulars of Claim, the Claimants complain of some of those letters, and the website item, as libels on them personally. They further contend (at Paragraph 22) that "the publications took place as part of a malicious campaign carried on by the Defendant to damage and discredit the Claimants and Durand, which the Defendant has been engaged on since about early 2007 with assistance from employees of the Lambeth Borough Council, who as the Defendant well knows have at all material times been implacably opposed to the Claimants and Durand". (It should be explained here that, according to the Amended Particulars of Claim, Durand is a Foundation School which

therefore faces some ideological and political hostility; the Borough Council is not a party to this action and has not had an opportunity here to respond to that allegation.)

5. The Defendant by his Defence denies this charge of malice and relies on justification, fair comment and absolute and qualified privilege, as well as a contract of settlement; this will be considered in more detail below.

C. The Solicitors' Correspondence

6. The solicitors' correspondence put before me is voluminous, but I hope it can selectively but fairly be summarised as follows (with a view to tracing the evolution and relative importance of the proposed settlement terms and in particular the apology provision). It is important to note that there is no suggestion in this case of any relevant oral communications between the parties and/or their solicitors, bearing on the existence or terms of any contract or agreement; all the evidence on those issues is before me in the form of the solicitors' correspondence, as would normally be the case where settlement negotiations between represented parties are concerned.
The Claimants are now represented by the well-known defamation specialist firm Carter-Ruck (CR), which dealt with the final phase of the settlement negotiations. Initially, however, they were represented by Lee Bolton Monier Williams (LBMW).

7. That firm's first letter (5 December 2007) was written on behalf of the Governors, and its primary purpose was to request, in connection with a complaint the Defendant had made about the School to the General Teaching Council, the evidence on which he based his assertions and the identity of his sources; it concluded however with the information that unnamed persons were considering defamation proceedings against him in relation to that complaint and the subsequent correspondence.
Their next important letter (for present purposes) was dated 8 January 2008. It referred to defamatory allegations against the head teacher and the Chairman, but concluded with an offer that no defamation proceedings would be taken against him if the Defendant agreed to disclose: all his correspondence and dealings with Lambeth; his letter to Lucy Reynolds (of the Department for Children, Schools and Families); and the identity of his sources. It made no reference to any apology or retraction, or any undertaking not to repeat the words complained of.
On 29 January 2008, LBMW renewed their requests for disclosure and information, with particular reference to communications with two senior officers of Lambeth; they concluded by saying that their clients were "extremely concerned that you are part of an orchestrated campaign against them and their senior employees and governors" and that unless a satisfactory answer was received by 4 February 2008 they would proceed to enforce their rights in Court.
On 14 February 2008, they wrote referring to a "scurrilous conspiracy" leading back to the Defendant and Lambeth; they asked for information under 6 categories, and stated that their purpose was "to put an end to the orchestrated campaign".

8. During the above period the Defendant was representing himself; he replied to the solicitors' correspondence stating his position, but nothing in his letters seems to me to bear on the legal/contractual questions now before me.
From 6 March 2008, however, he became represented by his present solicitors Freeth Cartwright (FC). On that date they wrote to LBMW with the sensible suggestion that if

defamation claims were being contemplated then the Defamation Pre-Action Protocol should be complied with, in order to clarify the matters in dispute.
This led to a formal letter of claim from LBMW dated 18 March 2008, which:

- identified the 3 proposed claimants (and also the Governors generally, who did not in fact become a party);
- specified 4 letters complained of, indicating the defamatory words and meanings; and
- sought relief under 6 heads: a. disclosure of documents; b. identification of sources; c. "a written apology and withdrawal in terms to be approved by ourselves on behalf of our clients"; d. undertaking against repetition; e. costs; and f. damages. (This was the first request for an apology.)

9. On 8 April 2008 FC replied, threatening a counterclaim and making a Without Prejudice offer in respect of disclosure, an undertaking, and an apology ("Our client is willing to apologise to your clients if they feel that they have been defamed.") The letter indicated that the Defendant was unable to identify the sources; it proposed that each side bear its own costs, and did not refer to damages.

10. On 15 April 2008 a protective claim form was issued but not served. On 2 June 2008, CR notified FC that they were now instructed by the three Claimants. They offered a final opportunity to resolve the matter by providing (all emphases are mine):
i. the disclosure sought;
ii. identification of sources;
iii. "a written apology and retraction in terms to be agreed," to be sent to the Department for Schools, Children and Families;
iv. an undertaking against repetition.
On 4 June 2008, FC replied seeking clarification; "Will you please confirm that if our client complies with those items" "that your clients will accept that as settlement."
On 10 June 2008 CR replied, adding to point i. above a request for an explanatory affidavit, and stating: "In the event that your client can agree to the proposals…as clarified above, our client will accept this as settlement of their claim… However, your client must be aware that if any documentation or information comes to our clients' attention that should have been disclosed under these settlement proposals this matter will be instantly resurrected."
FC replied the same day: "Our understanding is that agreement (and performance) of your clients' proposals as now clarified will be accepted by your clients in settlement of their claims including any claim for damages and costs".
CR replied on 12 June 2008; they did not expressly confirm FC's understanding, but stated that the proposals were aimed at settling their clients' issued proceedings and reserved their rights in respect of other claims as yet unknown.
On 18 June 2008 FC replied: "On the understanding that compliance with the following points will be accepted by your clients in full and final settlement of all claims" [within their present knowledge] "our client agrees as follows". They then listed the 4 points, accepting ii., iii., and iv., but elaborating i. by mentioning for the first time material that the Defendant had already disposed of. They offered to provide the disclosure affidavit within 14 days, and stated "With regard to the written apology and retraction and undertaking, we would invite you to suggest a form of wording for agreement by our client. If you would prefer us to draft wording then we shall do so and provide that to you within say seven days…"

11. The elaboration of point i. led to immediate disagreement with CR, and a flurry of correspondence ensued on that matter, which is not relevant for present purposes.

On 1 July 2008, CR wrote: "Our clients are prepared to agree to the terms that appear to now have been finally reached". (This welcome statement was somewhat undone by the next paragraph which requested a further assurance as to disclosure.) As to an apology, the letter then stated: "…We would suggest that no apology be drafted until such time as our clients know the full extent of your client's actions. Once we have reviewed the affidavit and documentation we will draft an apology which can then be agreed."
On 2 and 3 July 2008 there was further correspondence on the new disclosure requirement.
On 4 July 2008, FC sent CR an unsworn affidavit and bundle of documents, and three names that he stated to be the sources; he also stated his agreement to give the "extended co—operation" on disclosure sought by the letter of 3 July 2008. (The Defendant contends that from this point, at the latest, the settlement agreement was in force and proceedings were now precluded).

D. Subsequent Events

12. Whatever hopes may have existed on 4 July 2008 that this dispute was now at an amicable end were soon dashed.
On 18 July 2008, CR complained of "clear" and "wilful" breaches of "the agreement that was reached between our respective clients" relating to the adequacy of compliance with the disclosure obligation. On 22 July 2008, FC expressed surprise and disappointment at those allegations, which they considered "bullying and unreasonable". On 13 August 2008 CR sent FC the claim form and Particulars of Claim by way of (protective) service, together with further allegations of breach; but that letter also stated: "We will revert to you with a draft apology for the DCSF", and requested further disclosure under the agreement. FC declined to accept service, and on 15 September 2008 replied, contending that their client had co-operated fully, and stating: "We trust that your clients will agree that this matter is at an end save for the question of agreeing the terms of the apology, upon which we await hearing from you". On 30 September 2008, FC wrote again asking for a draft apology. On 10 October 2008 CR replied, referring back to their letter of 18 July 2008, which they said "detailed the information required from your client <u>before a final settlement could be reached".</u> (My emphasis.) On 13 October 2008 FC reasserted that their client had complied fully with the agreement and renewed their request for a draft apology.

13. On 9 December 2008, CR commenced these proceedings by serving a new Claim Form and Particulars of Claim on the Defendant personally. On 10 December 2008, FC responded, re-stating that a settlement agreement had been reached, that their client had fully performed all matters required of him, and that the terms of a draft apology were awaited. From this point, if not before, battle was joined; the solicitors' correspondence, though it continued, becomes retrospective and of little assistance on the present application.

E. The Defence

14. The Amended Particulars of Claim, served on 6 March 2009, was principally concerned with the defamation claim. In relation to contract, it asserted that no binding contract of compromise had ever been concluded (or if it had, there had been repudiation or misrepresentation) but that if there was such a contract the Defendant was in extensive breach of it.

15. The Defence, with a Statement of Truth signed personally by the Defendant on 27 March 2009, begins by stating that the compromise issues require determination before the merits of the libel claims can be determined, and goes on as follows:
"Paragraphs 11 to 44 below" [the libel defences, including justification] "are entered by the Defendant, therefore, in the strict alternative to his defence of compromise set out by Paragraphs 7 to 10 below…Had the Claimants observed the terms of the compromise agreement…then they would not have sued him in libel and he would not have needed to enter Paragraphs 11 to 44 below to defend himself". (I do not know if this rather unusual form of pleading was entered with a view to the second ground of this application, but it is plainly relevant to it.)

16. As there indicated, the Defence then goes on to plead, at Paragraphs 7 to 10 (which the Claimants now seek to strike out) a compromise agreement contained in and evidenced by the correspondence and taking effect no later than 4 July 2008, for which the Claimant provided consideration in the form of the disclosure material and undertaking, and by forbearance to sue; as to the apology, he had pressed the Claimants' solicitors to provide the draft.

17. At Paragraphs 11 to 44, it pleads a full range of libel defences, in particular justification of matters concerning one or more of the Claimants such as "an appalling record" in the employment of new teachers, "fabrication" of explanations, "dishonouring an agreement" with the Defendant's daughter, verbal aggression, and conflict of interest. (I refer to these allegations, not because they are or are not correct, which has yet to be determined, but because the fact that they have been put on the Court record may be relevant to my decision on the second ground of the application.)

18. Following service of that Defence, the present Application Notice was as I have said issued on 5 June 2009. Witness Statements have been served on both sides, but the nature of an application such as this, in which findings of contested issues of fact are generally inappropriate, means that the most important material before me is the contemporaneous documentation, in particular the correspondence to which I have referred above.

F. Ground 1; Apology in Terms to be Agreed

19. The Claimants' primary case on Ground 1 is based on a well-recognised principle most recently and authoritatively stated by the Privy Council in the case of Western Broadcasting Services v. Seaga [2007] UKPC 19, reported at [2007] EMLR 18. The Claimant in that action was the former Prime Minister of Jamaica. The Defendant was a radio broadcaster which had transmitted a programme said to be defamatory of him. A settlement meeting was held between the parties (and their lawyers) which resulted in agreement to settle the action upon terms that (among other things) the Defendant "would publish an apology acceptable to the Claimant to be drafted by the Claimant's Attorneys-at-Law for broadcasting on Hot 102 and CVM Television. The Attorneys-at-Law to decide on the number of times the apology would be published on each medium". A dispute arose as to whether this agreement had effected a binding settlement of the action. The Privy Council's conclusion was that it had not, because it contained two lacunae which had not been agreed and were impossible to fill, namely the terms of the apology and the number of times it was to be broadcast. They went on to say, at Paragraph 21:
"There may be cases in which the matter remaining to be negotiated is of such subsidiary importance as not to negative the intention of the parties to be bound by the more significant terms to which they have agreed: Chitty para.2-127. Their Lordships do not consider that the

present case could be so regarded. They are altogether unable to accept the view expressed by the Court of Appeal that the terms of the apology were "merely peripheral" and could not be considered an essential part of the agreement. In their opinion, the content and publication of the apology in a case such as the present are crucial, and failure to settle this essential term leaves the agreement incomplete for uncertainty."

20. If I may respectfully say so, that decision was obviously correct, not only in the Seaga case itself but in relation to the vast majority of defamation settlement agreements. There are two main reasons why express agreement on the actual words of the apology will generally be essential and crucial, rather than subsidiary and peripheral. First, the principal objective of most defamation actions is the protection and restoration of the Claimant's reputation, and an appropriately-worded apology is the clearest and most effective means of achieving this goal. Second, it is well known to everyone who has practised in this area of law that the negotiation of the precise words of the apology is one of the most delicate and precarious parts of any settlement, since the honour and pride of both parties are involved, and the disputed wording often assumes greater importance than the observer would regard as rational. To leave the apology to the last is to store up trouble.

21. A general principle is not an absolute rule, however, and it is clear that the Privy Council was not purporting to lay one down. There may be rare cases in which the wording of the apology is not an essential or crucial term of a defamation settlement agreement. Since this is an application under CPR 3.4 (2) a. and b., the issue before me is whether the Claimants have established on the evidence before me that the Defendant has no reasonable grounds for advancing his contractual defence, or that it is an abuse of process or otherwise likely to obstruct the just disposal of this action.

22. In the light of the solicitors' correspondence to which I have referred at Paragraphs 6 to 11 above, I am not able to reach any of those conclusions. It appears to me to be a real possibility, which may be made out at trial, that in this particular case the receipt of an apology, and indeed the vindication of their reputations, was not the main or even a significant part of the Claimants' reasons for bringing this claim and/or negotiating towards a settlement. Three matters, taken together, lead me to that assessment:
a. the relatively limited circulation of the words complained of (a marked contrast with Seaga for instance) and the even more limited proposed circulation of the apology;
b. the fact that the Claimants' solicitors never mentioned any apology or retraction during the first three months of the correspondence, and only did so then when the Defendant's solicitors drew their attention to the Protocol;
c. and the very much greater importance given, at all stages of the correspondence, to the obtaining of disclosure and information about other persons, particularly officials of Lambeth, who might be engaged in a campaign or conspiracy against the School. (That this was the main priority is strongly suggested by the Claimants' wish to postpone agreeing the wording of the apology until the disclosure was complete, and their delay in putting forward any draft, when a prompt apology is normally regarded as of great value.)
In the above circumstances, it remains a possible construction of the correspondence, in relation to which oral evidence may well be relevant and admissible as an aid to interpretation, that in this unusual case the failure to reach agreement on the terms of the apology is not of itself fatal to the Defendant's contention that the Claimants have contractually foregone their right to sue him.

22. That is not the end of Ground 1, however. The fact that no apology has been agreed is also relied on by the Claimants in a different way. They contend that on its true interpretation the agreement reached here was not simply for a mutual exchange of promises, such that the parties' respective obligations (in particular, the Claimants' obligation not to sue) arose at once, and any question of subsequent non-performance of those promises, for example in relation to the apology, merely raises issues of breach. Rather, they say, this agreement was expressly so structured that their obligation not to sue did not arise at all until the Defendant had performed all four of his obligations as first set out in CR's letter of 2 June 2008, including in particular the provision of an apology. In other words, it is contended, the four points were each conditions precedent to the existence of a binding obligation on the Claimants, and since for whatever reason no apology has been provided, their right of action is unaffected.

23. The Defendant responds to this analysis with two objections. First, that the fact that a particular provision is to have the status of a condition precedent must itself be an express term of the agreement, and that is not the case here. Second, that the Claimants are estopped by representation of fact from withdrawing from the compromise on this ground, since they had led him to believe that they were committed to the path of settlement, and he had acted to his detriment in reliance on that representation, by providing them with the disclosure and information they had asked him for.

24. I have reached the conclusion that both of these objections fall at the same hurdle, namely the clear and express terms of the Defendant's own solicitors' correspondence. I am referring to their letters of 10 and 18 June 2008, in particular the passages quoted and emphasised at Paragraph 10 above which make clear that they accept on their client's part that what is required of him is not merely agreement but "compliance" with / "performance" of the four points (no distinction being drawn between them) before the claims shall be regarded as settled. It appears to me that these letters (which though not expressly accepted by the Claimants' solicitors on this point were never disputed by them, for the obvious reason that the point was wholly in their clients' favour) conclusively establish that if, as is the Defendant's own case, there was a binding agreement here, its structure was that of conditions precedent to a compromise of the defamation claims. It further follows that the Claimants are not estopped from pursuing their claims by the fact that the Defendant has complied with some, but not all, of his precedent obligations. If the agreement expressly requires him first to comply with all of them (as I find it does) as the price of settlement, it cannot be unconscionable for the Claimants to hold him to that bargain. Put another way, it is not suggested that there were any representations other than those made in the solicitors' correspondence, and nothing there can be read as suggesting that though the Claimants wished the Defendant to accept certain terms they did not expect him to perform them; his own solicitors' letters show he was under no such illusion.

25. Lastly on Ground 1, I should consider the Defendant's point that, if he failed to fulfil an obligation to provide an apology, this was the Claimants' own doing, because it was they who offered to draft it (after disclosure) and then never did so. This may be true, but the Defendant was not precluded from submitting his own draft if he chose to do so, and if he had done so in reasonable terms which the Claimants had ignored or unreasonably rejected, then his position might have been very different in material respects, for example as to estoppel. If, as I have held, the agreement clearly requires him to provide an apology before the action is compromised, then he (or at least, his solicitors on his behalf) must be taken to

have known that the sword of Damocles would remain hanging over his head until, among other things, the apology had been agreed and sent.

G. Ground 2; Apology and Plea of Justification

26. I now turn to a separate argument put forward by the Claimants as to why the Defendant should not be permitted to rely on any settlement agreement. It is that he cannot now be permitted to rely on the defence of compromise, because the making of an apology is a term of the compromise, and his subsequent conduct in putting on the record a full plea of justification (verified by a statement of truth) is completely inconsistent with the making of such an apology; he has thereby rendered performance of his contractual obligations impossible and/or committed anticipatory breach. In support of that proposition the Claimants rely on the maxim that one cannot simultaneously "approbate and reprobate" the same instrument (here, the contract of settlement, which for the purposes of this part of the argument the Claimants accept should be treated as a complete and binding agreement). In answer, the Defendant places particular reliance on his careful pleading of the two defences in the strict alternative (as set out at Paragraph 15 above), and further contends that the effect of the statement of truth is more limited than the Claimants suggest, that the Claimants have themselves chosen to postpone the making of any apology, and that it would be an abuse of process for the Claimants to pursue him in defamation while relying on a contract that had the unfair effect of fettering him in the conduct of his defence.

27. In relation to "approbation and reprobation" the Claimants relied on the authorities of Lissenden v. CA Bosch [1940] 1 AC 412, Express Newspapers v. News (UK) [1990] 1 WLR 1320, and in particular Adelson v. Associated Newspapers [2008] EWHC 278 (QB), reported at [2009] EMLR 10. In Lissenden, Lord Maugham explained the term as a Scottish equivalent of the English equitable doctrine of election, but emphasised (at p. 418) that it had nothing to do with the common law principle of election as it applies for example to the pursuit of alternative remedies in a court of justice. He stated that it was confined to cases arising under wills, deeds and other instruments, and operated to prevent a person claiming both under such an instrument and also adversely to it (p. 419). But he was quite unable to see how it could apply to the case before him, in which it was attempted to bar a workman from appealing a compensation award on the ground that he had already accepted payment under it. Indeed, the House of Lords appear to have regarded such a use of the principle as a plain injustice, and Lord Wright (at p.435) quoted with approval Lord Esher MR's earlier warning: "I detest the attempt to fetter the law with maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them".

28. In Express Newspapers, Browne-Wilkinson V-C did accept the principle as one of general application: "A man cannot adopt two inconsistent attitudes towards another; he must elect between them, and having elected to adopt one stance cannot thereafter be permitted to go back and adopt an inconsistent stance". Thus, in that case, which concerned a copyright dispute between two newspapers over the "poaching" of each others' stories, he refused to allow the plaintiff, which had obtained judgment on its claim by advancing one case on the custom of the press in such cases, to resist the defendant's similar counterclaim by adopting the opposite position.

29. In Adelson, which is the closest to the present facts, Tugendhat J was considering an application by a defendant to stay a libel action on the basis that the defendant had made an open offer to settle on terms which rendered the pursuit of the litigation an abuse of process. The defendant had pleaded justification, but the open offer included the offer of participation in a bilateral statement in open court. At the hearing the defendant made it clear that it still believed its words to be true, in accordance with its plea of justification. In those circumstances, the Judge concluded that "so long as the Defendant is asserting its belief in the truth of the plea of justification, that part of the open offer involving the making of a statement in open court cannot be performed. That is an essential part of the open offer, and it follows that the Claimants cannot accept it. That conclusion is sufficient to dispose of the Defendant's application for a stay." In arriving at that conclusion, the Judge had accepted that "the Court does not expect a claimant to accept an apology which is not full and frank, and which the defendant does not believe in", and further that the Court would not "permit itself to be used for the making of a statement that the maker is at the same time declaring he believes to be untrue." However, he had also emphasised, at Paragraphs 58 and 59, that this was a decision on particular facts and that it would not necessarily apply to other cases in which there was a plea of justification on the record, but in which the defendant was offering to settle on terms involving apology and retraction. He gave the examples of a change of mind by the defendant, depending for instance on the availability of evidence, and of the words of the proposed apology not being inconsistent with the plea of justification.

30. In my view, the key to the above authorities and to the present question is the concept of election. If a party has formally elected between one of two incompatible courses in litigation, the court will not allow him also to run the alternative and inconsistent case. Thus in Express Newspapers, the obtaining of summary judgment on a particular basis was a clear and irrevocable step that rendered it unjust for the same party then to adopt the opposite tack in the later stages of the litigation. Similarly in Adelson, where the fact that the proposed apology was to be in open court meant that the court itself had a duty in respect of its terms and sincerity, the defendant was put to its election between justification and apology, and chose justification (to avoid that defence being struck out).

31. But in the present case, no such election has yet been made. This Defendant is running his two defences in the express alternative, a legitimate course which should not be impeded by over-strict interpretation of the obligation to verify one's statements of case (see Clarke v. Marlborough Fine Arts [2002] 1 WLR 1731 (Patten J) at Paragraph 30). In any case, no wording of the proposed apology has yet been proposed by either party, so it is not yet possible to be sure that there must be an irreconcilable inconsistency between the apology and the justification. (Even if there were, it is common practice for such an apology to state that the plea of justification is unequivocally withdrawn.) The effect of the Claimants' contentions on this issue would be to raise substantial obstacles not only to the Defendant's right and duty to put his whole case on record in his Defence, but also to the normal processes of negotiation and settlement after commencement of libel proceedings. I am very far from satisfied that it is clear that the Defendant is not entitled to put his case in this way.

32. The Claimants also put this point in terms of impossibility of performance and anticipatory breach. As to the former, I repeat that no draft has yet been put forward for consideration. I also note the Claimants' protestations that they could not now possibly accept any apology from this Defendant, but in the light of the uncertainty I have noted above about the importance of an apology to them I do not feel that I should give that too much weight. As to anticipatory breach, it is by no means plain and obvious that this contract contained any

provisions, express or implied, as to how the parties should present their cases if (contrary to the hypothetical terms of the agreement) the settlement failed and litigation was actually commenced. If Ground 2 were the only basis for the Claimants' application I would reject it.

H. Conclusion

33. For the above reasons, I therefore accept the Claimants' submission that the Defendant has no prospect of establishing that they are contractually debarred from pursuing their defamation action against him, and I direct pursuant to CPR Part 3.4(2)a. that those parts of the Defence which advance such a case be struck out.

34. I cannot leave this case without making the following general observations in relation to the negotiation of defamation settlement agreements.

a. Nothing in this judgment should be taken as undermining the general proposition that a defamation settlement which leaves the wording of the apology open is at very grave risk of being found incomplete and unenforceable, with consequent risk to the solicitors for the party or parties disadvantaged by that outcome.

b. Much if not all of the dispute outlined above could have been avoided, if having reached agreement in principle through correspondence, the solicitors had then drafted and signed a formal written contract or memorandum of agreement. The very process of doing so would have concentrated their minds on areas of ambiguity, and the likelihood of dispute about the terms of their agreement would have been greatly reduced.