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Case No: A2/2011/1382, A2/20111383, A2/2011/1382(Z), A2/2011/1383(Z)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION

Mr Justice Tugendhat
[2011] EWHC 1324 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2011

Before :

MASTER OF THE ROLLS
LORD JUSTICE THOMAS
and
LORD JUSTICE MOSES

Between :

Lalit Modi
and
International Management Group (UK) Ltd
- and -
Giles Clarke

Appellants

Respondent

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

Hugh Tomlinson QC and Sara Mansoori (instructed by Carter-Ruck) for the First Appellant

David Sherborne (instructed by Schillings) for the Second Appellant

James Price QC and Adam Speker (instructed by Rosenblatt) for the Respondent

Hearing date: 21 June 2011

Judgment

As Approved by the Court

Lord Justice Thomas: The background

1. The first appellant, Mr Lalit Modi, is an Indian businessman who claims he was responsible for setting up in 2008 the Indian Premier League which has operated the successful and profitable Twenty20 cricket league in India. The league has 10 teams consisting of players from various different countries competing against one another in the league.
2. On 31 March 2010 Mr Modi and two executives of the second appellants, International Management Group (UK) Limited (IMG), met in Delhi with three persons involved in English and Welsh county cricket, including Mr Stewart Regan, the Chief Executive of Yorkshire County Cricket Club. IMG's business includes commercial representation of international sports governing bodies; the Board of Control for Cricket in India was one of its clients.
3. It is evident from the report of the meeting prepared by Mr Regan that there was a discussion about whether a second franchise for Twenty20 cricket league could be established in the northern hemisphere. The proposal appears to have involved establishing 10 new English franchises, with the 10 existing Indian franchise owners being offered the first right to buy the new English franchises.
4. A copy of a report of the meeting was sent by e-mail on 31 March 2010 to a number of others involved in English county cricket. Sometime thereafter, on 2 May 2010, Mr Regan sent a copy of his e-mail containing a copy of the report of the meeting on 31 March 2010 to Mr Giles Clarke, the defendant to the action, in the form of an e-mail which Mr Regan had sent to several others involved in English and Welsh county cricket. Mr Clarke is Chairman of the England and Wales Cricket Board, the national governing body for cricket in England and Wales; he is also a director of the International Cricket Council, the international governing body of world cricket, and ICC Development International, the commercial arm of the International Cricket Council.
5. On Sunday 2 May 2010 Mr Clarke sent an e-mail to Mr Shashank Manohar, the President of the Board of Control for Cricket in India. At the time Mr Modi was a Vice-President of the Board of Control for Cricket in India and an alternate director on the Board of the International Cricket Council, though he has subsequently been removed from those positions. The e-mail was in the following terms:

“Dear Shashank

I attach an email detailing minutes of a meeting called by Mr Modi, held with IMG and 3 English Test grounds. A whistleblower provided this.

The minutes are self-explanatory.

It sets out a plan to destroy world cricket's structure and especially that in England, and create a new rebel league.

The plan seeks to remove all Boards' powers, and involve players in a fashion unheard of.

I am certain BCCI [the Board of Control for Cricket in India] had no knowledge of this meeting nor of these proposals, but Mr Modi clearly represents that [Indian Premier League] and its Governing Council are offering financial inducements to English counties.

*We have already commenced legal action with regard to the English officials and counties involved.

*We also wish to take action against IMG for promoting this along with Mr Modi and to seek their banning from world cricket.

*ICC [International Cricket Council] Regulations are very clear concerning contacts of this nature which are forbidden.

Your help and support in eradicating this threat and dealing with the miscreants will be greatly appreciated. The ECB [England and Wales Cricket Board] believes under your leadership the BCCI/ECB relationship has become very strong.

I have tried to call you to brief you.

I am in West Indies and communications are very varied.

With best personal wishes,

Giles.”

The e-mail attached was from Stewart Regan which appended his report of the meeting with Mr Modi and IMG. Some days later, on 8 May 2010, Mr Clarke wrote a letter (backdated to 2 May 2010) to Mr Shashank Manohar in the same terms as the e-mail, but omitting the paragraphs against which there is an asterisk. The meanings of the acronyms in the e-mail did not appear in the e-mail as sent.

6. The e-mail, together with the e-mail from Mr Regan, was copied to Mr Srinivasan, the Secretary of the Board of Control for Cricket in India and Mr Collier, the Chief Executive of the England and Wales Cricket Board. It was then published in a number of newspapers in India. There was much comment in the media on it in May 2010.

The proceedings

7. On 14 May 2010 IMG brought proceedings against Mr Clarke in respect of the e-mail and subsequently the letter; Mr Modi commenced proceedings on 16 June 2010 in respect of the e-mail. They claimed that the e-mail and letter were defamatory. A trial lasting 4 weeks was fixed for 4 July 2011, but has been adjourned.
8. On 5 May 2011, there was a pre-trial review before Tugendhat J. In the course of

reviewing the parties' cost budgets, Tugendhat J commented to counsel that he had looked in vain for provisions for a hearing on whether the words complained of were capable of bearing a defamatory meaning. He was told by counsel for Mr Clarke that there was not such provision, probably because it was accepted on all sides that the words complained of were capable of bearing the meaning pleaded and of being defamatory. As a result of further exchanges, on 9 May 2009 Mr Clarke issued an application in each of the proceedings for a ruling that the words complained of were not capable of bearing any meaning defamatory of either of the claimants.

9. The hearing on that application took place on 13 May 2011. In a reserved judgment handed down on 24 May 2011, Tugendhat J held that the words were not capable of bearing any meaning defamatory of either of the claimants. Although the judge refused leave to appeal, Sir Richard Buxton gave permission to appeal on one of the grounds to which I will refer.

The applicable law

10. There was no dispute as to the applicable law. Although there are a number of well-known definitions of the legal meaning of the word "defamatory", the case proceeded before the judge on the basis of the definition used by Sir Thomas Bingham, MR in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 where he said:

"A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally."

11. In deciding what meaning the words complained of were capable of bearing, it was again common ground that the court must have in mind the guidance given in *Skuse v Granada Television*, summarised most recently by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at paragraph 14:

"The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation..." (8) It follows that "it is not enough to say that by some person or another the words *might* be understood

in a defamatory sense."

12. It was also accepted that there is a distinction between "people generally" and a section of people. The distinction is set out in a number of authorities but the one relied on before the judge was that of Greer LJ in *Tolley v Fry* [1930] 1 KB 467 at 479 where he said:

"Words are not defamatory, however much they may damage a man in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that would disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man is not actionable within the law of defamation."

There are a number of cases which illustrate by their particular application this distinction. These include *Myroft v Sleight* (1921) 90 LJKB 888, *Clay v Roberts* (1863) 8 LT 397 and *Hughes v Architects' Registration Council of the UK* [1957] 2 QB 550.

13. The judge referred to other cases which elucidate the task of the court, but I do not think it necessary to refer to them. It is certainly not necessary to attempt yet again to restate the principles. It is sufficient to say that the judge should not usurp the function of the jury. He is entitled to delimit the range of meanings of which the words are reasonably capable of bearing, although it is not necessary to go so far as saying that a jury would be perverse to decide the words bore a defamatory meaning in order to delimit that meaning.
14. It was common ground before the judge and this court that the court should assume that the hypothetical reader would be able to understand the acronyms used in the e-mail (which I have included in the text) and other references to cricket which might not be understood by the ordinary member of the public. This would include knowledge of the positions in the organisations responsible for cricket which were held by each of the persons to whom the e-mails were sent and other persons named in the e-mail and its attachment, including the position held by Mr Modi. It was therefore important that the e-mail from Mr Clarke be read with the e-mail from Mr Regan setting out his report of the meeting. The full text of that report is at paragraph 29 of the judgment of the judge.
15. The task of the court was described by Lord Phillips MR who said in *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 where he adopted part of the judgment of Eady J:

"the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking,

but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.”

The pleaded defamatory meaning of the e-mail

16. The pleaded meaning of the words advanced by IMG was:

“In their natural and ordinary meaning the said words meant and were understood to mean that [IMG] was complicit in the promotion of a plan to destroy the structure of world cricket and especially that in England by the creation of a new rebel cricket league so as to subvert the legitimate powers of all national and world cricketing boards, including the ECB [England and Wales Cricket Board], the BCCI [Board of Control for Cricket in India] and the ICC [International Cricket Council], in a manner forbidden by the ICC regulations and such as to merit the banning of the miscreant [IMG] from any role in world cricket as well as the institution of legal proceedings.”

IMG in the claim for damages also alleged that the e-mail and letter:

“accused IMG of gross professional misconduct justifying not only it being banned from world cricket but also the institution of legal proceedings against it.”

17. The meaning advanced by Mr Modi was:

“In their natural and ordinary meaning the said words meant and were understood to mean that [Mr Modi] had been secretly orchestrating a plan to destroy the structure of world cricket and create a new rebel league; such conduct being unlawful, forbidden by ICC regulations, already the subject of legal proceedings and justifying his being banned from world cricket.”

The decision of the judge

18. The judge considered that those engaged in the world of sport must be taken to understand the difference between what is personal and what is professional or business. In professional or business matters, the law allowed for robust competition and a difference in view. The e-mail from Mr Regan expressed a difference of opinion on business matters; the response of Mr Clarke in the e-mail and letter complained of was a forceful response on business matters that did not impugn the

integrity of Mr Modi or IMG.

19. Read in the context of Mr Regan's e-mail which had been sent to a number of others engaged in cricket, the words complained of could not be understood to mean that Mr Clarke was accusing Mr Modi of something secret in the sense of something underhand or deceitful. There was nothing wrong in secrecy in itself; the words could not be understood as an allegation of disloyalty or dishonourable conduct on the part of Mr Modi.
20. He rejected IMG's claim because there was no imputation of dishonourable conduct or dishonesty. It might be the case that some of its clients or potential clients who disagreed with what was stated in the e-mail reporting the meeting on 31 March might no longer deal with it because of Mr Clarke's e-mail. But that was immaterial as that would only be the view of a section of society and not society in general.
21. He concluded at paragraph 68:

“Right thinking members of society have, by definition, a view of what is right or wrong in personal conduct. But the court cannot attribute to members of society generally any view on what might be the proper structures for the governance of cricket or the rules they should apply to any sport. That is not a matter of right or wrong in the sense of what is required by the legal definition of what is defamatory.”

The submission as to meaning advanced on the appeal

22. In the grounds of appeal Mr Modi and IMG put forward four alternatives as to the meaning the words were capable of bearing.
 - i) Mr Clarke's e-mail alleged that Mr Modi and IMG had called the meeting, whose objective was to destroy world cricket structure, such intention being plainly anti-social, disruptive and a threat which needed to be eradicated by their being banned from world cricket.
 - ii) Mr Modi and IMG had called the meeting secretly (until exposed by the whistle-blower) and behind the back of the Board of Cricket Control in India who allegedly had no knowledge, such conduct being plainly underhand, if not deceitful.
 - iii) The conduct of Mr Modi and IMG was such that those who attended the meeting called by him had already been made the subject of legal action by the England and Wales Cricket Board, in other words Mr Modi and IMG had by calling the meeting induced unlawful conduct on the part of those attending, and thereby acted unlawfully themselves.
 - iv) The contact initiated by Mr Modi and IMG with the English officials and

counties involved was very clearly forbidden by the regulations of the International Cricket Council.

23. In granting permission to appeal, Sir Richard Buxton considered that the only arguable meaning was that set out in sub-paragraph ii) above. However, despite Sir Richard's order that any application for renewal should not be made at the hearing of the appeal, it had not proved possible to hold a hearing for renewal of the application prior to the hearing of the appeal. Therefore Mr Modi and IMG sought, on the hearing of this appeal, to renew their application. This did not in the result matter as the principal submission advanced at the hearing was that the e-mail was capable of bearing the meaning that Mr Modi, who had agreed to be bound by the rules and practices of cricket, had acted dishonourably by undermining the rules at the same time; in respect of IMG, the words were capable of meaning that it had acted dishonourably by acting contrary to the interests of one of its clients. As the court must under CPR PD 53 para 4.1 consider not only the pleaded meaning but also "whether the statement is capable of bearing any other meaning defamatory of the claimant", the court must consider any meanings that can properly be advanced.
24. The issue before the court was therefore a short one – were the words complained of capable of bearing any defamatory meaning and in particular the meaning suggested in oral argument. Consonant with the significant amount of authority in this area of the law on a short question, the written submissions served on behalf of Mr Modi and IMG referred to a number of authorities where the task of answering the short question is qualified by various observations to which I have very briefly referred.
25. It was submitted that the judge had not approached the issue with this guidance in mind, but had engaged in an over-elaborate, over-refined analysis of the words. The words were plainly capable of bearing the meaning advanced.
26. IMG advanced one separate submission. It was contended that the words complained of also amounted to business defamation, as the allegation that the company was in breach of the code was an imputation that it was not providing services in the manner required of those in this field of activity and that might deter others from dealing with it: it relied on the judgment of Tugendhat J in *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB), [2010] EMLR 25 at paragraph 35 (ii).
27. It was contended on behalf of Mr Clarke that the e-mail and letter could not sensibly be read as impugning the personal integrity of Mr Modi or IMG or as accusing either of them of dishonourable misconduct or personal impropriety or of any lack of professional competence or skill. The e-mail and letter simply reflected a disagreement about the way forward for cricket and in addition in the e-mail, the failure to follow the procedures about international competitions. Neither the letter nor the e-mail could be read as accusing Mr Modi and IMG of personal impropriety. At most they could only properly be read as an accusation of breach of etiquette in the sense used in the old cases, namely those aspects of professional or sporting conduct which concern correct procedures governed by a code of conduct as opposed to aspects concerning disgraceful or unethical behaviour. Furthermore the judge was right to do what he did, as the jury could fall into error by considering the words disparaged Mr Modi and IMG in the eyes of the particular section of society, namely the governing bodies of cricket.

The meaning the words are capable of bearing

28. It is important to note that Mr Clarke has raised a number of other defences including honest comment, qualified privilege and justification. He also disputes liability for the wider publication and in particular the decision to make the e-mail public. These are not matters that arise on this appeal. It may be that in due course Mr Clarke will submit that there is no case fit for consideration by the jury. That is for the future. The sole issue on the appeal is whether the words complained of are capable of bearing any defamatory meaning. The fact that the costs of the action may be very high and the trial may take some weeks is also irrelevant to the question.
29. Nor, in my judgement, is it relevant to consider the danger that the jury might fall into error by being unable to distinguish between disparagement in the eyes of the community in general and the eyes of a section of the community. Any such danger can be addressed by proper directions to the jury who could be expected to follow them. It is therefore necessary to turn to the short question without being distracted by other issues which are irrelevant to the question which has to be decided.

Are the words capable of being defamatory?

30. Actions designed to destroy cricket's structure or which could be viewed by the cricketing authorities as requiring banning a person from cricket because of the desire to destroy its structure would only be considered defamatory by that section of the cricketing public which has faith in the current structure. It is difficult to see how saying of someone that he wishes to destroy the structure of world cricket would be considered by society at large as being disparaging; there may be all sorts of reasons why someone would wish to change the structure of cricket, but it would be only to that section that believed in the present structure that making such a statement would be disparaging. If, by way of example in another world sport, a person was seeking to undermine the existing structure and that person had meetings without telling the establishment, the view of that person's conduct would depend entirely upon the views of that section of the public interested in that sport on the current structure.
31. Nor could it be considered disparaging of someone that he had gone behind the backs of the England and Wales Cricket Board and entered into negotiations with the County representatives without making that fact known and keeping it secret. In ordinary business life, going to see a person in confidence and without telling others with the objective of doing a deal that might undermine the commercial position of another cannot in any way be said to be disparaging. It happens and is part of business life.
32. Nor in my view can it be said to be disparaging of someone that an action is being brought against him for inducing breach of contract (and therefore acting unlawfully under the civil law). As what the e-mail said was no more than an action was being brought for this, it is difficult to see how that was capable of being defamatory.
33. Nor it seems to me can it be said to be disparaging of someone that the contact was forbidden by the regulations of the International Cricket Council. I accept that in the

eyes of that section of the cricketing community that accords respect to the International Cricket Council, such words might be disparaging. However I cannot see how they could be understood to be disparaging by a member of society as a whole. A person seeking to bring about change cannot always abide by the rules of activity he is seeking to change. An accusation that he is breaking the rules is therefore only disparaging in the eyes of that section of the cricketing public that believes in the current structure.

34. The position in respect of Mr Modi is, however, different to other people who might be engaged in the conduct which I have described. I agree with the judge that no one is likely to think less of Mr Modi because he is said to have expressed rebellious ideas for the future of cricket, as it is possible to hold strong dissenting views within an organisation without in any way being dishonourable.
35. However, although in respect of others who acted as Mr Modi did, it could not be said the e-mail and letter contained anything that was capable of being defamatory, the e-mail is capable of meaning that Mr Modi was acting dishonourably as he was breaking the rules to which he had subscribed. Given his position as a Member of the Board of Control of Cricket in India and an alternate director of the International Cricket Council, the reader would know he had agreed to be bound by the rules and practices of those organisations that govern international and national cricket. The e-mail was capable of meaning that he had by his actions undermined those rules to which he was party whilst professing to be bound by them; he had engaged in secret meetings and was therefore acting dishonourably.
36. This was the contention advanced at the hearing. It is the only basis in my view on which the e-mail is capable of bearing a meaning defamatory of Mr Modi. The distinction between Mr Modi and others acting as he did is that made by Devlin J in *Hughes v Architects Registration Council* [1957] QB 550, an appeal in a disciplinary matter, at page 562:

“It is not of itself disgraceful to disagree with a majority view and to act accordingly. It is only if a man has bound himself in honour to accept that view and to act according to the code that a deliberate breach of the code for his own profit can be called disgraceful.”

In my view that reflects the position of Mr Modi and explains why the words are capable of having a defamatory meaning.

37. The position of IMG is not as straightforward, as it was not in the same position as Mr Modi who was a director of one of the governing bodies and alternate director of the other. The e-mail, however, referred to IMG as being in breach of International Cricket Council Regulations which prevented contacts of the kind that had taken place. Thus it can be said the e-mail asserted that it was bound by the rules and had dishonourably and disloyally breached them by attending the meeting on 31 March 2010. I have reached the conclusion that its conduct could therefore be viewed in the same light as that of Mr Modi by right thinking members of society generally, as I agree with the judge that it is society in general and not a section of it that is relevant. The words complained of are therefore capable of bearing a defamatory meaning of acting dishonourably and disloyally and not simply in a robust competitive manner.

38. It was submitted on behalf of Mr Clarke that it would be necessary to plead an innuendo, if this meaning was to be advanced by IMG and Mr Modi. However, I do not consider that necessary in the case of Mr Modi, as the implication or inference that Mr Modi was acting dishonourably for the reason alleged is evident from the e-mail to a reader with knowledge of the position in the organisations responsible for cricket which were held by Mr Modi, as I have set out at paragraph 14. Again the position of IMG is more difficult, but although its client relationship with the Board of Control of Cricket in India would not have been known to the ordinary reader, the ordinary reader could have inferred that International Cricket Council Regulations prohibited it from acting in the manner in which it had acted.
39. However in view of the limited basis on which I consider these claims can go forward, the pleadings will need to be amended to reflect that limited basis.

Conclusion

40. In reaching the conclusion that the words were capable of bearing the single defamatory meaning I have set out, I am differing from the judge who not only has immense experience in this field of law, but who analysed the issue in a careful manner without any over elaboration and set out his conclusions in a clear and thorough judgment. However, the argument developed in this court did not form as strong a focus before the judge. As I have set out, I agree with his general approach so cogently expressed by him; it is only on the very narrow point that I have set out that I have reached a different view.
41. As Mr Price QC pointed out on behalf of Mr Clarke, it may very well be the case that it can be established that Mr Modi and IMG were in fact acting dishonourably. However the fact that the claim of Mr Modi and IMG may for this reason be a very weak one, on the basis of the defamatory meaning which I consider the e-mail and letter are capable of bearing, does not mean that it is permissible to hold that the words are not capable of bearing that defamatory meaning.

Lord Justice Moses:

42. I agree.

Master of the Rolls:

43. I also agree.