Neutral Citation Number: [2009] EWHC 561 (QB)

Case No: 7LV90185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Queen Elizabeth II Court
Liverpool

Date: 17.3.09

Before :

MR JUSTICE COULSON

- -

Between :

Mr BAHRAM NOORANI	**Claimant**
- and -	
MR RICHARD CALVER	**Defendant**

- -
- -

No 1

Ms Lois Cole-Wilson (instructed by **Kirwans**) for the Claimant
Mr Jacob Dean (instructed by **E. Rex Makin**) for the Defendant

Hearing Date: 16.3.09

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Judgment

Mr Justice Coulson:

A. INTRODUCTION

1. At the material time the claimant was the deputy chairman of the West Kirby and Thurstaston branch of the Wirral West Conservative Association ("the Association"). The defendant was the Chairman of the Association and both were members of the Association's Executive Council. On 28th June 2007, the defendant published a letter to the Secretary of the Association who, on his behalf, republished the same by e-mail to the Executive Council. There were approximately 25-30 recipients. The claimant complains that the letter was defamatory. The defendant denies that the letter contained the defamatory allegations complained of. The defendant also maintains that, if the words were defamatory, they were in any event true and/or the letter was protected by qualified privilege. In this context, the defendant denies malice.

2. In addition to the action in libel arising out of the letter of 28th June referred to above, there is a separate slander allegation arising out of an alleged conversation between the defendant and the claimant's wife and teenage daughter in West Kirby on Tuesday 10th July 2007. The defendant is alleged to have said, amongst other things, "No wonder you have depression, married to a Islamist terrorist. He is a refugee. He is a troublemaker. We should get rid of these people and rebuild the country". The defendant denies that this conversation ever took place.

3. In August 2008 the trial on these separate causes of action was fixed to start on 16th March 2009, with witness statements being exchanged in November. Unhappily the statements were not exchanged until the middle of February 2009 and contained a good deal of irrelevant and inadmissible material. I have had to spend the PTR on the 12th March, and all of yesterday, 16th March, which was supposed to be the first day of the trial, dealing with numerous applications arising out of these witness statements. This Judgment relates just to one of those applications.

4. The defendant seeks to strike out the slander allegation, outlined in paragraph 2 above, on the grounds that:

a) In the circumstances in which they were allegedly said, the words complained of were vulgar abuse rather than words capable of being defamatory; and

b) The words do not allege the commission of a criminal offence punishable by imprisonment, and therefore are not words which are actionable without proof of special damage (which is not alleged here); or

c) Even if the hurdles at a) and b) above can be overcome by the claimant, the evidence does not reveal a real and substantial tort such that the proceedings do not serve the legitimate purpose of protecting the claimant's reputation and are an abuse of process.

5. I deal with one preliminary matter at **Section B** below. I then go on at **Sections C, D and E** to deal with the three matters of substance identified above. At **Section F**, I address briefly the potential relevance of the alleged conversation on the 10th July to the issue of malice.

B. EVIDENCE OF DAMAGE

6. One of the points taken by Mr Dean on behalf of the defendant in his thorough skeleton argument provided for the PTR on 12th March was that nowhere in the statements of the claimant's wife and daughter was there anything to say that the alleged slander had damaged the claimant's reputation in their eyes. As Mr Dean correctly pointed out at paragraph 27 of his skeleton:

> "…neither says that she thought anything less of the claimant as a result, became worried about the fact that he might be a terrorist, took any steps to confront the claimant about the allegation (indeed Mrs Noorani did not mention it to her husband at first) or gave any store whatsoever to the abuse said to have been levelled at him. The evidence shows what is apparent from the context, that although the words were offensive, they were not capable of damaging the claimant's reputation. In those circumstances, the court should decide as a matter of law that the words are not capable of being defamatory and so are not actionable".

7. On Sunday 15th March, further statements were obtained from the claimant's wife and daughter dealing with this very issue, in which there is now a suggestion that both women did potentially think less of the claimant. Ms Cole-Wilson, for the claimant, conceded that it was a fair inference that this new evidence was designed to plug the gap in the claimant's case which Mr Dean had revealed, in an attempt to avoid the slander claim being struck out. In my judgment, that concession is rightly made. This evidence can only have been triggered by the application by the defendant to strike out the slander allegation. In consequence I am naturally somewhat sceptical as to its authenticity, the point never having been raised before.

8. In addition, although the claimant's wife goes so far as to say that it went through her mind "that I should now not trust my husband and that everything that we had shared was false", I am bound to note that:

a) She says that she did not even tell her husband about the conversation for over 3 months;

b) She says that she did not know that her daughter had told her husband about the conversation;

c) She says that she only told her husband about the conversation when she saw a letter from his solicitors which dealt in detail with that conversation;

d) She does not explain how and why this evidence (which, if true, might be important), was nowhere hinted at in her original statement.

9. Accordingly, I must recognise that evidence to the damage, if any, done to the claimant's reputation by the alleged conversation in West Kirby is, at the very least, open to very serious doubt.

C. VULGAR ABUSE OR DEFAMATION?

10. It is trite law that "insults which do not diminish a man's standing among other people do not found an action in libel or slander": see Neill LJ in ***Berkoff v Burchill*** [1997] EMLR 139 at 146. The most authoritative guidance on the proper approach of the court can be found in the judgement of Eady J in ***Gillick v Brook Advisory Centres*** [2001] EWCA Civ 1263, cited by Lord Phillips as "an impeccable synthesis of the authorities in this area". Eady J summarised the position in this way:

> "The proper role for the judge when adjudicating a question of this kind is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his or her own judgment in the light of the principles laid down in the authorities and without any of the former Order 18 Rule 19 overtones. If the judge decides that any pleaded meaning falls outside the permissible range, then it will be his duty to rule accordingly. In deciding whether words are capable of conveying a defamatory meaning, the court should reject those meanings which can only emerge as the produce of some strange or forced or utterly unreasonable interpretation. The purpose of the new rule is to enable the court to fix in advance the ground rules and permissible meaning which are of cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the claimant's reputation, but also for the purpose of evaluating any defences raised, in particular, justification and fair comment.
>
> 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".

11. There is no doubt there can be many contexts in which describing someone as an Islamist terrorist is capable of being, and often will be, unarguably defamatory: see for example ***Associated Newspapers Limited v Burstein*** [2007] EWCA Civ 600 and ***Sheikh Khalid Bin Mahfouz v Jean-Charles Brisard*** [2006] EWHC 119 (QB). The question is whether, in the context of this case, the words allegedly used are capable of being defamatory.

12. I accept Mr Dean's submission that the context in which the words are said, or alleged to have been said, are important in considering whether those words are capable of being defamatory: see ***Nigel Smith v ADVFN Plc and others*** [2008] EWHC 1797 (QB).

13. Mr Dean argues that, on the claimant's own case, this was a very brief conversation in the middle of the day, in a shopping street in West Kirby. The words, if spoken at all

(something which the defendant vehemently denies), were spoken to the claimant's wife, with his daughter listening in. That context, argues Mr Dean, shows that any allegation of terrorism was not meant to be taken seriously. Ms Cole-Wilson referred to the cases which I have already identified in paragraph 11 above, and asserted that the words were capable of being defamatory because they were so serious.

14. I have concluded that, although the context in which the words were allegedly spoken provides some support for the suggestion that they were not intended to be taken seriously (if they were spoken at all), the alleged description of the claimant as an Islamic terrorist was so serious a matter that I could not conclude that the words were not capable of being defamatory. Vulgar abuse is not, I think, an apt description of those words. In this context, I note that the defendant himself describes the words allegedly used as "vicious and racist". I respectfully agree with his description, and in those circumstances I consider that the first threshold has just been crossed by the claimant's case.

D. ACTIONABLE PER SE

15. Mr Dean contends that the words, if published in the context alleged, would not have been understood by any reasonable person to impute to the claimant the action of a criminal offence punishable by imprisonment. He argues that there is no criminal offence being an Islamic terrorist. In response, Ms Cole-Wilson argues, by reference to (amongst other things) section 1 of the **Terrorism Act 2000,** that terrorism is indeed a specific crime. Further, I note that, pursuant to the **Terrorism Act 2006,** there is an offence of glorification of terrorism: as Lord Carlile pointed out in his reading 'Terrorism: Cold War Or Bad Law?', on 26th June 2008 at Barnard's Inn, (reported in Graya 122 page 41, at page 50) "juries are ready to convict of inchoate and rather unspecific terrorism crimes".

16. Again it seems to me that, notwithstanding the context, I should give the claimant the benefit of the doubt on this issue as well. Being a terrorist is a criminal offence as defined by numerous recent statutes. The fact that the allegation is not to the effect that the claimant was a bomber or an assassin does not prevent these words from relating to the commission of serious and specific criminal offences.

17. Thus I consider that the claimant's case gets over the second threshold too.

E. ABUSE OF PROCESS

18. The leading case in this area of law is ***Jameel v Dow Jones and Co Inc*** [2005] QB 946. In that case, a claim based on the publication of words capable of being defamatory to just five people, three of whom were described as being 'in the claimant's camp', were struck out as an abuse of process. The Court of Appeal accepted the submission that no substantial tort had been committed: publication had been minimal and had done no significant damage to the claimant's reputation. They therefore concluded that the pursuit of the action was disproportionate and an abuse of the process. The relevant paragraphs from the judgment of Lord Phillips are as follows:

> "54…. An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The

court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

55… There have been two recent developments which have rendered the court more ready to entertain a submission in pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of an individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process, defamation proceedings which are not serving the legitimate purpose of protection of the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged…

69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country but both the damage and the vindication will be minimal. The costs of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

70…. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little now seems to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action of defamation where although the claim is small, the issues are complex and subject to special procedure under the CPR".

19. Similar conclusions were reached by Gray J in ***Bezant v Rausing*** [2007] EWHC 1118 (QB) where publication was just to the claimant's daughter and his accountant, and by Eady J in ***McBride v Body Shop Int Plc*** [2007] EWHC 1658 (QB) where publication was by e-mail to two individuals at the claimant's workplace. Both judges concluded that the ***Jameel*** threshold had been made out in their respective cases.

20. Mr Dean relied on those authorities to demonstrate that this case, where publication was just to the claimant's wife and daughter, and was not written but spoken, was caught fair and square by the principles outlined in ***Jameel.*** He said that any damages should be no more than £1000 at the very most, and that the claimant's own irrecoverable costs of pursuing the slander action, let alone both sides' costs on that issue, would vastly outweigh such a gain. Moreover he said, this was not a case about vindication, since publication had been limited to the claimant's immediate family. Although Ms Cole-Wilson said that damages might be in the region of £5,000, and that the family connection actually served to increase the potential fall-out from the incident, she had no points to counter Mr Dean's analysis of the law and the authorities.

21. In my judgment, there was, in truth, no answer to that analysis. This case falls precisely within the ***Jameel*** line of authority. Indeed it is in many ways a stronger case because:

a) The words were allegedly spoken in one brief conversation in the street. They were never written down.

b) They were published to just two people, and they were the claimant's wife and his daughter and so were therefore persons wholly 'within his camp', as it was referred to in ***Jameel***.

c) The words were never published at any stage to a third party of any kind.
In other words, the context is such that even if, as I have found, the claimant's case gets over the first two hurdles, it must fail at this third hurdle. The context negates the possibility in my judgment that this claim is capable of being 'a real and substantial tort'.

22. Furthermore, there are other reasons why I would exercise my discretion in favour of granting the application to strike out the slander allegation. The first is the point identified in **Section B** above, namely the suspect nature of the 11th hour evidence of the alleged damage to the claimant's reputation or standing caused by the alleged slander. There was no such evidence until the day before the trial, and the evidence that has been adduced in the supplementary statements is, in my judgment, less than compelling.

23. Secondly, there are the proportionality points. Even if the slander claim is successful, I consider that Mr Dean is right to say that the level of damages would be in the region of £1000. That is much less than the cost to the parties of fighting this allegation through to the bitter end. It is wholly disproportionate to involve a judge and a fully staffed court, let alone a jury, in the detailed consideration of such an allegation when any result, even at best for the claimant, would be worth less than the costs of achieving it. In this context it is worth noting that the claimant has the benefit of a CFA but the defendant does not.

24. Thirdly, there is no question of any need for vindication, since the words were not published to anyone other than the claimant's wife and daughter. In my view, there is no requirement or need for vindication.

25. For all those reasons, although I consider that the claimant's case does just about get past the thresholds at **Sections C and D** above, it wholly fails at this last stage. In my judgment, the ***Jameel*** abuse argument is unanswerable. When taken in the round - that is to say by reference to the context, the alleged words used, the limited publication, the fact that the only two publishees were the claimant's wife and daughter, the lack of any proper evidence of damage to reputation - it seems to me that this is a clear case where the slander allegation should be struck out as an abuse of process.

F. MALICE

26. The only remaining issue concerns the allegation or assertion of malice and whether or not the claimant should be entitled to lead evidence about the alleged conversation on the 10th July as a particular of malice. Malice is an issue for the jury in connection with the defamation claims arising out of the letter of 28th June 2007, and the defence of

qualified privilege. Mr Dean contends that the evidence of the conversation should not be adduced because it is not a particular of malice. Ms Cole-Wilson disagrees.

27. Malice is a question for the jury, provided there is evidence of it to be left to them: see ***Dorset Flint and Stone Ltd v Moir*** [2004] EWHC 2173 (QB). Alleging malice is the equivalent of alleging dishonesty: see ***Bray v Deutsche Bank AG*** [2008] EWHC 263 (QB). It is necessary that the evidence should raise a probability of malice and be more consistent with its existence than its non-existence: see ***Turner v MGM Pictures*** [1950] 1 All ER 449.

28. I have concluded that it would not be appropriate *in advance of the evidence being adduced* to rule that any evidence relating to the alleged conversation on 10th July 2007 is inadmissible on the issue of malice. It can be legitimate for a claimant to rely on a defendant's conduct, upon occasions other than that protected by privilege, to endeavour to justify the inference that, on the privileged occasion too, his obvious motive in publishing what he did was personal spite or some other improper motive: see Lord Diplock in ***Horrocks v Lowe*** [1975] AC 135.

29. However, I emphasise that, at the conclusion of the oral evidence, the issue may well need to be revisited. It may be that, once the evidence has been called, the correct conclusion is that there is, in truth, no issue of malice to be left to the jury. However that issue is for another day. At this stage I am not prepared to rule out the evidence of the conversation altogether.

30. Although this means that there will be some oral evidence of the conversation on 10th July, it is still appropriate to strike out the slander allegations for the reasons that I have noted. Without there being a separate allegation, even if there is some evidence about the conversation adduced at the trial, I am in no doubt that there will be a considerable saving of time and effort as a result.

G. CONCLUSIONS

31. For the reasons set out in **Sections C-E** above I have concluded that the slander allegation should be struck out on the grounds of ***Jameel*** abuse. For the reasons set out in **Section F** above, I have concluded that, at least at this stage, the evidence of the alleged conversation on 10th July should not be ruled inadmissible on the issue of malice.