Neutral Citation Number: [2004] EWHC 2422 (QB)

Case No: HQ04X01371

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2004

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

ANNA RICHARDSON **Claimant**

- and -

1. ARNOLD SCHWARZENEGGER **Defendants**
2. SEAN WALSH
3. SHERYL MAIN

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- -

David Sherborne (instructed by Campbell Hooper) for the Claimant
Richard Spearman QC and James Strachan (instructed by Schillings) for the second Defendant

Hearing dates: 19th to 20th October 2004

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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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Mr Justice Eady :

1. In this libel action the second Defendant, Mr Sean Walsh, applies by notice dated 16th August 2004 to set aside the Master's order giving the Claimant permission to serve him out of the jurisdiction. He is a United States citizen and he is domiciled there. The order under challenge was made by Master Leslie on 10th May 2004. He gave permission on two of the grounds contemplated in CPR 6.20, namely that the Claimant has sustained damage within this jurisdiction and, secondly, that she seeks an injunction to restrain defamatory publication in England and Wales.

2. The Claimant is Anna Richardson who seeks remedies in respect of the publication, in this jurisdiction, of words contained in an article in the issue of *The Los Angeles Times* for 2nd October 2003. The complaint relates both to the hard copies published here and to the publication of the same piece on the World Wide Web – but again limited to publication in this jurisdiction. It is to be noted that the claim is not made against any of the authors of the article or against the publishers of the newspaper. The Defendants are (1) Arnold Schwarzenegger, currently Governor of California, (2) Sean Walsh, whose application is now before the Court, and (3) Sheryl Main. As I understand the position, despite the Master having given permission to serve in respect of all three Defendants, the first and third Defendendants have only been served very recently. The Claimant's solicitor deposed in his witness statement of 14th October that Mr Schwarzenegger had 'finally' been served. During the hearing counsel informed me that Ms Main had been served on 18th October. Although it is not yet, therefore, appropriate for Mr Schwarzenegger or Ms Main to make any application to this Court, there is no reason to suppose that either of them will submit to the jurisdiction. For the moment, however, I am concerned with the arguments raised on behalf of Mr Walsh, some of which are personal to him while others will no doubt be of equal application in respect of the other Defendants. Mr Walsh comes into the case because of the role he was playing last year in Mr Schwarzenegger's gubernatorial campaign as a political publicist. He was apparently widely recognised at the time as the candidate's principal spokesman.

3. During the campaign a topic which attracted particular attention in the media was that concerning allegations apparently made by various women that Mr Schwarzenegger had sexually assaulted or harassed them. One such person was the Claimant. The article which forms the subject of the present claim is headed 'Women Say Schwarzenegger Groped, Humiliated Them'. One of Mr Walsh's functions at the time seems to have been to field queries on the subject and to conduct a damage limitation exercise. It is in that context that the Claimant says she was defamed. It is necessary to quote part of the words complained of:

> "Schwarzenegger's campaign spokesman, Sean Walsh, said the candidate has not engaged in inappropriate conduct towards women. He said such allegations are part of an escalating political attack on Schwarzenegger as the recall election approaches.
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> 'We believe Democrats and others are using this to try and hurt Arnold Schwarzenegger's campaign', Walsh said. 'We believe that this is coming so close before the election, something that discourages good, hard-working, decent people from running for office'.

> Walsh said Schwarzenegger himself would have no comment.
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> …
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> One of the women in the 2001 Premiere article was British television host Anna Richardson, who accused Schwarzenegger of touching her breast. In an interview with The Times, she re-iterated that account.
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> Richardson said she was interviewing the actor in December 2000 as part of his promotional tour for the movie 'The Sixth Day'. The interview, to be aired on her TV show, 'Big Screen,' took place in a suite at the Dorchester Hotel in London.
>
> Richardson said she has interviewed Schwarzenegger on previous occasion and that he had been a 'perfect gentleman'.
>
> 'This time around was quite different', she recalled. 'He kept looking at my breasts, kept asking if I worked out', she said. 'I went to shake his hand and he grabbed me onto his knee and said, 'Before you go, I want to know if your breasts are real'.
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> Richardson, then 29, said she replied that her breasts were real. She said she looked around for assistance. 'At that point, he circled my left nipple with his finger and he said, 'Yes, they are real'. She said he then let her go.
>
> The Schwarzenegger campaign provided a different account.
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> Sheryl Main, a Hollywood publicist who has worked with Schwarzenegger on many films and accompanied him on his worldwide travels since 1995, said she was present at the interview with Richardson. Main said it was Richardson who provocatively approached Schwarzenegger. She said that after finishing the brief interview, Richardson rose, cupped her right breast in her hand and said, 'What do you think of these?' She then sat on his lap, and was immediately escorted from the room, Main said.
>
> She contends that Richardson later concocted her story".

4. The natural and ordinary meaning attributed to the words is that the Claimant "deliberately and dishonestly fabricated" the allegations of sexual assault. The motive is also, she says, attributed to her of damaging Mr Schwarzenegger's political ambitions. That may be thought a little unnecessary. The sting of the words is probably that she dishonestly misrepresented what happened in December 2000 when she was interviewing him at the Dorchester Hotel in London. Whether her motives were political or to achieve publicity or financial gain for herself may be considered peripheral.

5. One factor which distinguishes Mr Walsh from the other parties is that he was not present at the Dorchester at the material time and he could thus not be a primary witness of fact to those events. He spoke whatever words he uttered as a spokesman

for Mr Schwarzenegger. It should be recorded that he does not accept everything attributed to him in the article. In particular, he denies ever having said that Mr Schwarzenegger 'has not engaged in improper conduct toward women'. Indeed, it seems that Mr Schwarzenegger found himself during the campaign admitting certain improprieties and apologising publicly for them. It is submitted on Mr Walsh's behalf that Ms Richardson's essential complaint will inevitably focus at trial, if the matter proceeds that far, upon Ms Main's specific allegations about her behaviour in December 2000. On the face of the article, at least, that was not something for which Mr Walsh was responsible.

6. If Mr Walsh did (contrary to his own case) make the sweeping denial of impropriety on Mr Schwarzenegger's part, then logically his words would imply that any woman (including the Claimant) who made such allegations would not be telling the truth. That general denial was not, however, specifically directed at the Claimant. He also said, probably accurately, that the allegations were being exploited by Mr Schwarzenegger's political opponents. Since Ms Richardson appears in the article to be quoted as confirming and renewing her allegations of assault in December 2000, a possible meaning is that she too was prompted to do so for political reasons. Assuming that she was telling the truth, however, there is no reason why such allegations should not be made known to the electorate. I doubt if anyone would think the worse of her for telling the truth in such a context. As I said earlier, the nub of her complaint is that she is portrayed as lying.

7. There is room for debate, therefore, as to whether anything attributed to Mr Walsh in the article (as opposed to Ms Main) actually does convey any such imputation to the reasonable reader.

8. Even if what Mr Walsh actually said, however, did not convey any defamatory meaning with regard to the Claimant, it is necessary to take into account another argument raised by the Claimant. It was argued (and rather sketchily adverted to in the Particulars of Claim) that Mr Walsh must have authorised or procured what Ms Main said. The Claimant also, and indeed primarily, asserts that Ms Main and Mr Walsh were acting on the instructions and authority of the first Defendant. In correspondence with his US attorneys, the stance taken so far is that anything either Mr Walsh or Ms Main said was *not* done with the first Defendant's authority. Whether that is correct or not, it is clearly perceived as important for the Claimant to have the other two Defendants in the action so as to be able to establish liability directly against them in the event that the first Defendant takes no part in the proceedings or, if he does so, if it is accepted ultimately that the others acted without authority.

9. Mr Sherborne, for the Claimant, seeks to link the Defendants' activities and invite the inference that they were 'in it together'. He eschewed any assertion of conspiracy as such, but relies on certain assertions of fact as to the circumstances in which they came to be involved in the published denials of 2nd October 2003. In the light of those matters, he suggests that the Court could not at this stage rule out the possibility that the second and third Defendants discussed and co-ordinated their responses to the queries raised on behalf of *The Los Angeles Times* prior to publication. From those circumstances, and the parties' respective roles in the gubernatorial campaign, he says that it may be inferred at trial that it was inconceivable that Ms Main would have chipped in independently, on a frolic of her own. The probability is, Mr Sherborne suggests, that as the first Defendant's principal spokesman and publicity adviser Mr

Walsh would have co-ordinated and suggested, encouraged or authorised Ms Main's direct rebuttal of the Claimant's story. That is, as I have said, thinly sketched in the evidence and the statement of case, but it is at least there.

10. What is the relevance of all this to the present application? I have to address a number of matters. Because of the international dimension, I have to consider the necessary preconditions stipulated in CPR 6.20 and, in due course, the arguments on *forum conveniens*. Also, however, I must weigh up the Claimant's case, as so far disclosed, in order to test it by the criteria applicable under CPR Part 24. Does it have a real prospect of success, or is it so fundamentally flawed that it should now be struck out and the second Defendant given summary judgment? If there is no adequately pleaded cause of action against him, because (say) the words attributed to him are not defamatory, or because he was not responsible for such words as are capable of being defamatory, then on that basis the claim would be bound to fail and should be struck out accordingly. It is in this context that I must consider the submissions I have referred to.

11. Mr Spearman QC, for the second Defendant, has an alternative submission in this respect. Even if there is a realistic prospect of the Claimant's establishing that his client was responsible for publishing words defamatory of the Claimant (whether directly, or as a participant of some kind behind the scenes), there would be an unanswerable defence under English law of qualified privilege. Mr Sherborne responds that, on the facts as they stand at the moment, this defence cannot be asserted with such confidence. The defence of privilege put forward by the second Defendant could not be determined without the facts being found at trial.

12. The privilege for which Mr Spearman contends has been argued both on the basis of Mr Walsh's discharging a duty, as the first Defendant's agent, and acting within the scope of his authority; and, alternatively, that he was entitled to respond to an attack made against the first Defendant's character in relation of his treatment of women. There was argument at the Bar as to whether one or other of these defences could be characterised as 'parasitic', in the sense that Mr Walsh might have a privilege only on a derivative basis; that it is to say, whether he would need to establish privilege on the first Defendant's part as a necessary pre-condition because, if that element were absent, he would have no privilege himself.

13. For example, it was suggested in *Fraser-Armstrong v Hadow* [1995] EMLR 140 that no privilege attaches to a defendant's 'reply to attack' in circumstances where he knows that the attack is well founded. So here the question might arise, if the Claimant's evidence as to the groping in December 2000 is accepted at trial, how the first Defendant could be entitled to privilege since he would *ex hypothesi* know that the attack was a 'true bill'. In *Fraser-Armstrong* Simon Brown LJ suggested that it did not matter whether this proposition was analysed on the basis that such a defendant would not be accorded privilege at all, or on the basis that the privilege was defeated by the malice inherent in a dishonest rebuttal. In this case, however, it *would* matter because if the first Defendant had no privilege in respect of any rebuttal then, on one view of the law, neither of the other Defendants would have any privilege for that purpose either.

14. I consider, however, that the correct analysis would almost certainly be that any agents who truly had authority to act on the first Defendant's behalf would be accorded privilege under English law for any rebuttal. Whether that defence would

succeed in respect of any individual defendant would then depend on whether malice could be shown on the part of that individual. Take the following scenario. If the first Defendant had issued a denial of the Claimant's story either directly or through agents acting on his behalf, *and* it were held that he knew that the Claimant's story was actually true, then he would lose the protection of privilege. If, however, he issued such a denial through agents, and the agents themselves were not malicious, then they, if sued separately, might still claim the protection of privilege. Here, there is no sign so far that the first Defendant is interested in raising privilege at all. His stance, through lawyers, has been that the Claimant was not giving a true account of events at the Dorchester. He also seems to be denying that either of the other Defendants had any authority to speak on his behalf.

15. None of this was addressed before the Master, when he gave permission to serve out. That is hardly surprising, since privilege has only been raised for the purposes of this application on the second Defendant's behalf. There has been some criticism of the Claimant's solicitor for lack, in this respect, of full and frank disclosure. In the circumstances, I find that far-fetched. I see no basis for such criticism. It is unreal to expect such sophisticated arguments to have been foreshadowed before the Master.

16. It should by now have become apparent that the second Defendant's supposed defence of privilege cannot at this stage be characterised as 'cast iron' or 'unanswerable'. The extent of his authority to speak on the first Defendant's behalf is uncertain. It is relevant in a number of respects. As I have already described, it is relevant to the validity of the inference Mr Sherborne invites as to whether the second Defendant can be fixed with responsibility for what the third Defendant said. It is also relevant in this context of privilege. Unless he had authority, express or implied, to answer questions about sexual harassment raised by *The Los Angeles Times*, it is difficult to see how he would be protected by qualified privilege either on the basis of discharging a general duty, owed in that capacity, *or* on the alternative basis of responding to an attack on his principal's character.

17. I am now in a position to state my conclusions on the Part 24 issue. It is too early to say that the Claimant's case is bound to fail or that it has no real prospect of success. The following issues of fact, at least, would need to be resolved:

(i) What did the second Defendant actually say?

(ii) Were his words fairly and accurately summarised in *The Los Angeles Times?*

(iii) Was anything he said defamatory of the Claimant?

(iv) Did he have authority to speak on behalf of the first Defendant?

(v) If so, what was the scope of that authority?

(vi) What did the third Defendant say to *The Los Angeles Times*?

(vii) Did the second and third Defendants co-ordinate or enter into prior discussion about their communications to *The Los Angeles Times* on 1st or 2nd October 2003?

18. It is thus impossible to rule out the possibility that the Claimant would establish at trial, including against the second Defendant, a cause of action in libel; that is to say, that he was responsible by one means or another for communication of words to the effect that she had lied about her experience in December 2000. I must now turn to certain principles of law which I need to apply to the facts I have summarised.

19. First, it is well settled now that an internet publication takes place in any jurisdiction where the relevant words are read or downloaded: see e.g. *Gutnick v Dow Jones* [2002] HCA 56; *Lewis v King* [2004] EWCA Civ 1329. There is no 'single publication rule' applying to trans-national libels.

20. Second, the English law of defamation provides for a presumption of damage to reputation once any defamatory communication has been established: *Shevill v Presse Alliance* [1996] AC 959.

21. The Claimant can, therefore, in my judgment show a real prospect of success of establishing that a tort has been committed within this jurisdiction and that she has suffered at least some damage in consequence. This claim is limited to recovering compensation in accordance with those principles. She is not claiming for any publication or damage elsewhere. Nor could she: *Schapira v Ahronson* [1999] EMLR 735.

22. I must next embark on the exercise of determining whether this jurisdiction is the *forum conveniens*. A judge has to decide such questions in the light of the circumstances of the individual case, but the principles of law which must guide me are well established and have been summarised yet again in the recent case of *Lewis v King*, cited above. The 'starting point' is to be found in *The Albaforth* [1984] 2 Ll. Rep. 91. Where the Court has jurisdiction on the basis that an alleged tort has been committed within the scope of its jurisdiction, it will usually be difficult to resist the conclusion that this is the natural *forum*. It is likely to be the *forum* in which it is just and reasonable for the defendant to answer for his alleged wrongdoing: see also *Berezovsky v Forbes Inc* [2000] 1 WLR 1004, 1014.

23. This is only a starting point, and common sense suggests that the more tenuous the connection with this country the harder it will be for the claim to survive. It is necessary to consider, in determining *forum conveniens*, whether there have been publications also in other jurisdictions. That will always be a relevant factor. The weight given to it will depend on the particular circumstances and especially the strength of the claimant's connection with this country: see *Berezovsk*y, cited above, and *King v Lewis* at [25].

24. Here the scales come down positively in favour of the English Court. I identify the following factors which particularly lead me to that conclusion:

    (i) The Claimant is a United Kingdom citizen;

    (ii) She is resident here;

    (iii) She works here;

    (iv) She is widely known through work here and has an established reputation in this country;

(v) She has no comparable connection with any other jurisdiction, including the United States;

(vi) In the light of the presumption, to which I have referred, damage to her reputation has been suffered here;

(vii) The underlying events, if there is ever to be a plea of justification, took place here at the Dorchester Hotel in December 2000;

(viii) English law is applicable to the publication in this country.

25. I need to bear in mind, on the other side, that the factual substratum for any defence of qualified privilege, as foreshadowed in argument, would need to be adduced in evidence from the defendants (at least primarily so), each of whom is resident in the United States. That is not a factor which could possibly outweigh the considerations I have listed above.

26. It is conceivable also that there may be some other witnesses to be called from the United States if the first Defendant enters a plea of justification, as it seems that there were at least some other Americans present in the room at the Dorchester at the time. This is far too speculative at the moment, and I need to bear in mind that *this* Defendant is proposing to plead qualified privilege only and not justification.

27. I have some sympathy for the second Defendant, and I have not lost sight of Mr Spearman's opening submission, or *cri de coeur*, which identified the question for the Court as follows.

"This case is about whether a spokesman for a foreign politician in a local election campaign who was asked by a foreign newspaper to respond on behalf of the foreign electoral candidate to allegations concerning the past conduct of that candidate, and who provided a response that is immune from suit under local law and is protected by qualified privilege under our system of law in circumstances where malice is not and could not reasonably be alleged, should nevertheless be amenable to the exorbitant jurisdiction of the English court on the basis that:

(1) the foreign newspaper reported his response;

(2) there is an inference that the foreign newspaper's report was accessed by a number of readers within this jurisdiction;

(3) the foreign newspaper's report was republished in the English media and was repeated on search engine home pages;

(4) it is arguable that the spokesman for the foreign politician intended or foresaw those consequences;

(5) the allegations concerning the foreign politician's past conduct were made by an individual who has a reputation in this jurisdiction, such that the response to those allegations arguably harmed that reputation and is presumed to have caused damage in this jurisdiction;

(6) neither an award of damages nor an injunction would be enforced in the foreign court, and although the foreign newspaper publisher has not been joined as a defendant, this court would grant a permanent injunction against the foreign political spokesman following a finding on liability in the claimant's favour on the basis that such an injunction would prevent him "causing others to report the allegations here or repeating them in any form of media ... which is published in this country".

28. That is seductively put as though it were a new scenario free from authority. But it would seem to ignore the clear and recently stated principles of English law which I have already summarised. Mr Spearman would, of course, at the stage of drafting his submissions not have been aware of the Court of Appeal's reaffirmation of those principles in *Lewis v King*. That decision was only handed down in the course of the application.

29. Like the Court of Appeal in *Lewis v King*, I find the injunction claim 'problematic'. I bear in mind that, for reasons of practicality, I declined to grant such an injunction against *The Wall Street Journal* to the successful Claimant in *Jameel v Wall Street Journal* [2004] EMLR 196. I need not address, still less pre-judge, the merits of this claim in view of the soundness of the alternative basis (i.e. defamatory publication within the jurisdiction causing damage here).

30. There is no warrant for drawing a distinction (as was tentatively canvassed in argument) between those who deliberately publish or put matters on the World Wide Web as part of their business and those who do so incidentally, and without intending to target any particular jurisdiction for the receipt of their communications: *Lewis v King* at [33] to [34]. It seems to be a question of applying or adapting settled principles as to legal responsibility for publication, including that relating to foreseeability: see e.g. *McManus v Beckham* [2002] EWCA Civ 939.

31. In conclusion, I find myself unable to fault the Master's order and the application is accordingly dismissed.