Neutral Citation Number: [2009] EWHC 1870 (QB)

Case No: HQ07X00017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 30th July 2009

Before :

HIS HONOUR JUDGE MOLONEY QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

STEVE SANDERS	**Claimant**
- and -	
(1) STEVE PERCY	**Defendants**
(2) MINISTRY OF JUSTICE	

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The Claimant appeared in Person
Christina Michalos (instructed by **The Treasury Solicitor**) for the **Defendants**

Hearing date: 17th July 2009

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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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HH Judge Moloney :

A. INTRODUCTION

This is the judgment of the Court upon the Defendants' application (by notice dated 5 March 2009) to strike out the claim in whole or part under CPR 3.4, and/or enter summary judgment under CPR Part 24. The claim, as disclosed by the Amended Particulars of Claim (undated, but served in September 2008) relates to:

a) slander on 5 January 2006;

b) harassment over the period from 1 April 2004 to 26 April 2007;

c) and (possibly) further claims in breach of confidence and defamation set out in very short form at Paragraphs 12 and 13 of the Amended Particulars of Claim.

B. FACTUAL BACKGROUND

2. The Claimant describes himself as "a member of the public", and his occupations appear to include work in the fields of music and entertainment. The First Defendant is a Listing Officer at Barnet County Court, employed by Her Majesty's Court Service; the Second Defendant is the government department responsible for HMCS, and was joined as a co-defendant on its own application on 20 February 2008. The Claimant is a regular user of the Barnet County Court, and all aspects of the present claims arise from his dealings with the First Defendant and other staff and judges there in relation to his various proceedings.

3. In chronological order, the principal incidents to which his claim relates (as set out in the Amended Particulars of Claim, which for the purposes of this application are to be accepted as factually accurate, though they are disputed in material respects in the Defence) include the following:

a) an incident on 1 April 2004 when the Claimant was ejected from the Court building by the First Defendant, who made disparaging remarks about his claims;

b) an incident on 1 August 2004 in the Court car park, in the course of which the First Defendant called the police to investigate the Claimant's car;

c) the telephone conversation on 5 January 2006 between the First Defendant and the Claimant's then solicitor Mr Whittington, which gave rise to the slander claim (considered in more detail below);

d) an incident shortly thereafter in which the First Defendant expressed unwarranted interest in the Claimant's having recovered £14,000 by way of settlement;

e) an incident in April 2007 in which the First Defendant informed the Claimant that he "just so happened to be looking at" the Claimant's case file, and (according to the Claimant) misled him as to an adjournment of the hearing of his case;

f) and an undated incident, probably in early 2006, when the First Defendant reported the Claimant to the Benefits Agency for fraud and/or encouraged the District Judge to direct the Claimant's solicitor to do so.

4. The above incidents, taken together, form the subject of the claim for harassment.

5. The slander claim arises as follows. In 2005, the Claimant was suing Cassandra Fox in the Barnet County Court. A draft Consent Order, signed by solicitors for both parties and dated 15 December 2005, was submitted to the Court for approval; it provided for the payment of £14,000 to the Claimant and £6,000 to his solicitor (Collins Long) in respect of costs. The District Judge noted that Collins Long were not on the record, and inquired of Ms Fox's solicitors (by letter dated 3 January 2006) why the £6,000 legal fees were being paid. On 4 January 2006 Collins Long served a

Notice of Acting and it appears that the District Judge requested the First Defendant to ask them why the fees were due. On 5 January 2006, the First Defendant telephoned Mr Whittington, and received the explanation (confirmed by fax later that day) that his firm had in fact been acting for Mr Sanders since 2002 on a conditional fee agreement and had done "a great deal of work ... leading up to the settlement."

6. However, it also appears that in the course of that conversation the First Defendant not only passed on the District Judge's query about Collins Long's role in the Fox litigation, but also began talking about Mr Sanders's other cases (which did not involve Collins Long) and his general character. According to the Amended Particulars of Claim (which are based on an unsigned witness statement from Mr Whittington, shown to the Court at this hearing) his words included the following:

a) "Your client has engaged in ridiculous previous legal actions and is a vexatious litigant."

b) "You have been assisting your client with his vexatious matters."

c) "Your client was involved in an action against Specsavers in which he claimed payment for providing services as an Ali G impersonator which Specsavers resisted because he does not look very much like Ali G. I look more like Ali G than he does. He does not in any way resemble Ali G and (in my opinion) his claim must be a load of nonsense."

d) "Previous actions your client has brought are ludicrous and a load of nonsense."

e) "Your client is a chancer."

f) "You should report your client to the benefits office as I believe he is a benefit fraudster who is not going to disclose the fact that he is receiving a settlement to the benefits office."

g) "It is your duty to report Mr Sanders for benefit fraud. I will give you the number of the benefits agency."

h) "I have reported Mr Sanders to the DSS for benefit fraud."

i) "I once called the police while Mr Sanders was at the court building as he was driving his car without a tax disc."

7. Following that conversation , the First Defendant reported back to the District Judge, who on 31 January 2006 marked the Consent Order with his approval, but also added the following proviso:

> "A copy of this Order shall be disclosed by the Claimant's solicitors to the Department of Social Security if the Claimant still receives benefits, and evidence of such disclosure to be filed at court within 7 days."

(The Claimant invites the inference that that proviso was included in the order as the result of "encouragement" by the First Defendant, and relies on it as part of the alleged campaign of harassment.)

C. THE SLANDER CLAIM

8. The Defendants, by their application, seek to have the claim as a whole characterised as an abuse of process and dismissed; but they also make applications specific to the slander claim, as follows:

a) that some of the allegations complained of are not actionable without proof of special damage (which is not pleaded);

b) that the limited allegations which remain, published only to the claimant's own solicitor, constitute "a game which is not worth the candle", and should be struck out or dismissed as an abuse of process

under the principles set out in *Jameel v. Dow Jones* [2005] EWCA Civ 75.

9. As to the issue of slander actionable *per se*, the Defendants are in many respects on strong ground. In slander, as opposed to libel, spoken words are generally actionable only on proof of some special damage, generally a specific pecuniary loss, attributable to the words. There are, however, some established exceptions to this principle, of which the ones relevant here are:

   i) words imputing guilt of a crime punishable by imprisonment;

   ii) words calculated to disparage the claimant in any office, profession, trade or business carried on by him at the date of publication (whether or not those words relate specifically to such office, etc.).

10. The Defendants accept that the allegations relating to benefit fraud (set out at 6 above, items f), g) and h).) do impute an imprisonable offence. As to the words at i) (driving without a tax disc) they rightly point out that that offence is only punishable by a fine; therefore that part of the words complained of discloses no cause of action.

11. As to the words at a), b), d). and e), these make no allusion to crime, and can only be actionable if they fall into the second exception referred to above. On their face, they plainly do not, and there is nothing pleaded (by way either of context in the conversation as a whole or of "innuendo facts" known to Mr Whittington) which could give those words a different meaning. The Claimant contended before me that since his previous litigations did in fact arise from his work, criticisms of that litigation as vexatious would necessarily also be criticisms disparaging of him in relation to the work which underlay the litigation. This could only be the case if the hearer were sufficiently familiar with that litigation to be able to draw that inference. In the light of Mr Whittington's witness statement, that would be a very difficult case

to run; but in any event it is not the pleaded case, and no amendment was proposed to cover the deficiency. I therefore strike out the words at a), b), d) and e).

12. As to the words at c), relating to the Claimant's previous action against Specsavers for work done as an impersonator of the comic character Ali G, the position is different. It is clear from the words themselves, by which the First Defendant informed Mr Whittington about the nature of that litigation, that he was not only criticising the Claimant in relation to his conduct of the litigation (which would not be actionable *per se*) but also going further and criticising the quality of his impersonation. Ms Michalos presented an ingenious argument that the words were not an attack on his work itself, but merely an observation about his physical appearance by comparison with that of the well-known comic character Ali G. I am unable to accept this; impersonation is a species of acting, depending on skill in (for example) performance, voice and make-up as well as on natural resemblance, and the First Defendant's alleged words are plainly capable of injuring the Claimant in relation to that aspect of his money-making activities. If this were the sole objection to an action based on these words, I would not strike them out.

13. However, I have also to take into account the second limb of the Defendants' application, based on "*Jameel* abuse of process" and also the Court's general case-management responsibilities, in particular the duty to ensure that litigation is focussed on the essential issues and that time and expense are not wasted on trivial or irrelevant matters. In relation to both the remaining aspects of the slander claim (the benefit fraud and Ali G allegations), the Defendants forcefully and correctly point out that the words complained of were published only to one person and that he was the Claimant's own solicitor, who does not appear to have believed them or acted on them in any way to the Claimant's detriment. Ms Michalos drew my attention not only to *Jameel* (*supra*) but also to the later cases of *Freer v. Zeb* [2008] EWHC 212 and *Bezant v. Rausing* [2007] EWCH 1118, in which the specialist defamation judges

had struck out claims in relation to similarly small numbers of publishees on the ground that the limited advantages accruing to the Claimant if successful could not outweigh the expense to the parties, and the waste of Court resources, involved in permitting such a trivial case to go on trial.

14. In relation to the "Ali G allegation", I accept these submissions. Not only is this allegation of far less gravity in terms of level of defamatory meaning than the "benefit fraud allegation", but also I note that in his witness statement Mr Whittington makes clear that the First Defendant was joking about the Ali G matter, as one can well believe. Further, this passage is actionable only because of its potential effect on the Claimant's business, and there is no reason whatever to suppose either that Mr Whittington was likely to be hiring Ali G impersonators or recommending them to others. Lastly, there is a real danger that if this allegation were to form part of the Claimant's cause of action it would give rise to collateral factual disputes irrelevant to the central focus of this litigation, the First Defendant's alleged abuse of his position as a court officer to injure the Claimant. On *Jameel* and case-management grounds I strike out the words at c).

15. In relation to the allegations concerning benefit fraud, I take a different view. The following factors distinguish those words from the "Ali G" words, and this case from the others cited to me, in which claims based on very limited publication have been struck out:

    a) the inherent gravity of the allegation;

    b) the fact that it was made to the Claimant's own solicitor, related directly to the litigation in which he was acting, and was apparently intended to persuade him to act to his client's detriment;

c) crucially, the fact that the speaker was a court officer acting or purporting to act in relation to Court business. Not only does this fact give rise to the possibility of an award of exemplary damages exceeding the (plainly very limited) compensatory award to which the Claimant would otherwise be entitled, it also bears powerfully on the appropriateness of striking out. If a member of the public has solid grounds for a complaint that he is the victim of a legal wrong done to him by an officer of the court acting in connection with his official capacity, the judicial system should in my view be very slow to shut him out from a trial and a possible remedy simply on the pragmatic and resource-based grounds relied on in *Jameel* cases. (This is the polar opposite of a case like *Jameel* in which there is reason to doubt the very appropriateness of the English court as a forum for the dispute.) I note by way of analogy the alternative ground under Part 24.2 for allowing an action to proceed even if it has no real prospect of success: that there is nevertheless a "compelling reason why the case should be disposed of at a trial". It appears to me that this is, or may well be, a case to which a similar approach is applicable.

For these reasons, I do not consider a slander action based solely on the benefit fraud allegation to be an abuse of process on *Jameel* grounds.

16. Lastly under this head I should refer to the Defendants' contention that the slander claim was in any case bound to fail because qualified privilege had been pleaded (and was plainly applicable) and because no Reply alleging malice had been served. It seems to me that in this case it may possibly be a fact-sensitive question whether privilege does attach to these words (given the limited purpose for which the District Judge asked the First Defendant to call the solicitor). More importantly, the Amended Particulars of Claim already hint at a case of express malice, and the Claimant has explained his failure to serve a Reply on the basis of his belief that the Defence had

been served (if at all) out of time, so that no Reply was due, and indeed he was entitled to default judgment. (See further, para. 31 below.) I am not very impressed with the procedural merits of that point, but I do conclude that no injustice would be done to the Defendants by allowing the Claimant the opportunity to put forward a Reply alleging express malice if he considers it right to do so.

D. THE HARASSMENT CLAIM

17. As in relation to the slander claim, the Defendants attack the harassment claim on two separate but inter-related bases:

    a) that the matters pleaded do not disclose a case of harassment as known to the law:

    b) that even if, and insofar as, they do, the claim is so trivial that it should be struck out on *Jameel* grounds.

18. The civil wrong of harassment is a statutory tort created by s.3 of the Protection from Harassment Act 1997. Under that Act, the Claimant must show:

    a) that the Defendant has pursued "a course of conduct" involving acts or speech on at least two occasions;

    b) and that that course of conduct amounts to harassment, which includes (but is not limited to) alarming the claimant or causing him distress.

    (There are other requirements, which are not relevant to this application.)

19. The Defendants here contend:

    a) that none of the matters relied on as occasions of harassment can properly be characterised as such, in terms of being such as to cause alarm or distress;

b) that even if two or more of them do pass that test, still they are separate and unrelated incidents which cannot properly be characterised as constituting a "course of conduct".

20. As to the former contention, the Court must be careful on an interim application like the present not to trespass into fact-sensitive areas. The Particulars of Harassment are set out at Paragraph 9 of the Amended Particulars of Claim, not unfortunately in strict chronological order.

a) The incident of 1 April 2004 (Particulars 2-7) includes allegations of ejecting the Claimant, banning him from the premises, threats to call the police, expressions of anger, and discussing the Claimant's cases and benefit entitlement in a loud, insulting and disparaging manner. If true, this is plainly capable of causing alarm and distress.

b) The incident of 1 August 2004 is set out at Particular 10, which alleges that the First Defendant was angry and intimidatory, that the police were called, and the express averment that as a result the Claimant was "in a state of distress". Again, this is potentially an instance of harassment.

c) The slander of 5 January 2006 is also relied on as an act of harassment (Particular 1). Given that the solicitor was plainly likely to report the conversation to his client, it appears to me that this is capable of constituting an act of harassment, although ostensibly directed at a third party.

d) The incident shortly thereafter (Particulars 8 and 9) concerns the allegation that the First Defendant demonstrated "excessive and unwarranted interest" in the Claimant's recovery of the £14,000

settlement referred to above. The Claimant told me that given the background he found this interest in his affairs disturbing. I consider it possible that there may be an element of hindsight in this, but since the matter is closely connected with the slander, and likely to form part of the facts before the Court in any event, I am prepared to leave it for decision at trial whether this behaviour meets the requirements of harassment.

e) Also related to the slander are the allegations of harassment at Particulars 14 and 15; that the First Defendant reported the Claimant to the Benefits Agency for benefit fraud, and that he encouraged the District Judge to include in his order the proviso on that subject above referred to. Particular 14 gives rise to a specific problem. It seeks to render actionable the reporting of a person to the proper authority for criminal investigation. But any such conduct is, as a matter of public policy, immune from suit: see *Westcott v. Westcott* [2008] EWCA Civ. 818. I therefore strike out Particular 14. Particular 15, however, does not raise that problem and is so closely related to the other matters concerning the alleged slander which will be in issue that it should be allowed to stand.

f) Finally, Particulars 11, 12 and 13 relate to an incident on 26 April 2007, when the Claimant alleges the First Defendant deliberately contrived to prejudice him in relation to another case, by misleading him as to an adjournment. I have two concerns about this. Firstly, even if it were true that the First Defendant had deceived the Claimant in this way, that conduct, though prejudicial to the Claimant's interests, does not appear to me to be calculated to cause the sort of mischief (alarm, distress or similar) that the law of

harassment is aimed at, if only because it is covert and not intended to come to his knowledge. Secondly, rather as with the "Ali G" matter in relation to the slander, it is far removed from the other incidents in time and subject-matter, and would necessitate a close examination of a collateral body of facts, without any likelihood that that inquiry would materially assist the Court in determining the principal issue before it. I therefore strike those Particulars out, both as being deficient in point of law and in any event on case-management grounds.

21. As to the second basis of objection to the harassment claim, that these are a series of individual incidents not capable of constituting a "course of conduct", the Defendants referred me to *Sai Lau v DPP* (22 February 1999, Divisional Court), in which Schiemann J stated as follows (at Paragraph 15):

> "I fully accept that the incidents which need to be proved in elation to harassment need not exceed two incidents, but, as it seems to me, the fewer the occasions and the wider they are spread the less likely it would be that a finding of harassment can reasonably be made. One can conceive of circumstances where incidents, as far apart as a year, would constitute a course of conduct and harassment. In argument Mr Laddie put the context of racial harassment taking place outside a synagogue on a religious holiday, such as the day of atonement, and being repeated each year as the day of atonement came round. Another example might be a threat to do something once a year on a person's birthday. Nonetheless the broad position must be that if one is left with only two incidents you have to see whether what happened on those two occasions can be described as a course of conduct."

22. The Defendants contend:

a) that the various incidents set out in the Particulars of Harassment are entirely unconnected;

b) and that the time-lapses here (between April and August 2004, and then nearly 18 months to early 2006) are too great for the incidents fairly to be called a course of conduct.

23. On the Claimant's part, one notes the following common factors:

a) that all the incidents relate to his dealings with the First Defendant at Barnet County Court;

b) that they are linked by the common factor of the First Defendant's alleged hostility to him, as a court-user, which manifests itself in various ways as and when the Claimant presents himself to that court.

24. As the judgment in *Lau* also makes clear, the question "is this a course of conduct?" is not to be decided by the application of mathematical rules, but depends on the evidence, in particular as to the reasons for the particular incidents and the Defendant's motivation in relation to them. In my view, the Claimant has a sufficiently good prospect of establishing at trial that at least two of these incidents can be linked into a course of conduct, that it would be wrong to strike out or dismiss his claim at this stage.

25. Separately from the above points of law, the Defendants also invite me to strike out the harassment claim on *Jameel* grounds. It appears to me that the case for doing so is, if anything, less strong than in relation to the slander claim. Damages for harassment focus on the anxiety and distress caused to the Claimant. He pleads that he has in the past suffered from breakdown, anxiety and depression, and that these matters exacerbated his symptoms. If his harassment claim succeeds, he would be entitled to reasonable compensation for that, together with exemplary damages if the necessary conditions were met, as is possible in the present case involving a public

servant. Lastly, the same policy issues referred to at 15(c) above apply with equal or greater force to a claim for a campaign of harassment by a court official over a long period. I therefore refuse this part of the Defendants' application.

26. The Defendants also put forward in their skeleton argument the proposition that their substantive defences to harassment were bound to succeed. Rightly, this was not pursued in oral argument: the defences may well be good, but that cannot be assessed at this early stage in the litigation.

27. Finally, in relation to the Amended Particulars of Claim, I should refer to Paragraphs 12 and 13:

> "12. Further and/or alternatively, information coming to the knowledge of the 2nd defendant and its servants (including the 1st defendant) consisting of the facts and matters pertaining to civil claims filed by individuals, companies and other litigants is information in relation to which a duty of confidence is owed save only to the extent, if any, to which the general public has a lawful right of access thereto. In breach of the said duty, acting by the 1st defendant, the 2nd defendant has disclosed confidential information to persons (namely other court users) not entitled to receive it. The claimant repeats paragraphs 9(6), (7) and (9) above.
>
> 13. Further, in or about 2004 during the course of and with reference to a claim made by the claimant against Psycho Management Ltd, the customer services manager Barnet County Court, Barbara Mortimer, informed Mr John Mabely, a director of the said company, that the claimant was notorious at the court, that he sued everybody and that everybody at the court knew all about him."

28. Paragraph 12 raises a purported claim in breach of confidence in relation to some of the incidents relied on as harassment. Those pleaded at Particulars 9(6) and (7) do aver publication of information to third parties, but the matters to which they refer are plainly not confidential information relating to the Claimant's civil claims. Particular (9) may concern confidential material, but publication to third parties is not alleged. In any event, no case is made as to consequential loss. The Claimant's complaints

about this conduct are sufficiently covered by his harassment claim and do not require consideration of a separate cause of action which is highly unlikely to succeed.

29. Paragraph 13 refers to an entirely separate incident in 2004 when a different official at Barnet County Court allegedly made defamatory remarks about the Claimant to a director of the company he was suing. If this is anything, it is a separate slander action in respect of which the limitation period has long expired. Both Paragraphs 12 and 13 should be struck out.

E. ABUSE OF PROCESS: DELAY

30. The last point argued before me was that the claims should be struck out as an abuse of process on the separate grounds of delay by the Claimant in pursuing his claim, as was done in *Grovit v Doctor* [1997] 1 WLR 640.

31. There is no doubt that the action has proceeded very slowly.

a) The conversation giving rise to the slander claim was on 5 January 2006.

b) Proceedings were issued on 3 January 2007, just within the 1-year defamation limitation period (though in harassment the period remains 6 years).

c) The claim form was not served until 8 September 2007, after obtaining several extensions.

d) In November 2007, the Claimant obtained judgment in default of defence against the First Defendant, and the Treasury Solicitor applied for a stay to comply with the Defamation Pre-Action Protocol.

e) On 20 February 2008 the default judgment was set aside, the Second Defendant joined at its own request, and the Claimant given permission to serve Amended Particulars of Claim by 10 April 2008.

f) The Claimant sought repeated extensions (he told me that he had been having difficulty getting evidence from Mr Whittington) and after consenting to an "unless order" eventually served his Amended Particulars of Claim on 30 September 2008.

g) The Defence was served by email on 6 November 2008. The Claimant objected that this was at least a day out of time, and an improper mode of service, and has been trying to enter default judgment. (No such application was formally before me, but in light of his own history of delay it was clear to me that inevitably default judgment would either have been refused or (if granted) set aside. The action will proceed on the basis that the Claimant has been served with the Defence.)

h) Because of this view that the Defence had not been served, the Claimant did not consider himself obliged to serve any Reply.

i) The present application was issued by the Defendants on 5 March 2009, but it has taken over 4 months to come to a hearing.

j) It is now over 3½ years since the alleged slander.

32. There is no doubt that the above chronology reveals a considerable history of delay, most though not all of it attributable to the Claimant. Many cases have been struck out for delay or want of prosecution in similar circumstances. But it is important to note that, as the House of Lords made clear in *Grovit v. Doctor* (*supra*) the abuse of process in such cases is not so much the delay itself as the inference (which the delay

may well give rise to) that the Claimant has no desire to bring his litigation to a conclusion. (This is particularly likely to be the case in defamation actions, in which the stifling effect of long-running litigation may serve some claimants' interests better than exposing their affairs to the scrutiny of a final trial).

33. In the present case, however, the delay does not give rise to any such inference. This Claimant has twice tried to bring matters to a conclusion by way of default judgment, and nothing in his demeanour before me suggested a person who was deliberately spinning out litigation for an improper motive. Like many litigants in person, he can be criticised for sometimes elevating procedure over substance, and for treating time limits as a minimum rather than a maximum, but that is not the same as abuse of process in the *Grovit* sense.

34. Although I am not going to strike the action out on this ground now, I do warn the Claimant that from now on the action will proceed to a strict timetable, and that any further culpable delay on his part will be very likely to lead to his claims being struck out on the next occasion.

35. Before leaving this part of the case, I should record that Ms Michalos invited me to consider all aspects of the case together, in order to reach an overall conclusion on abuse of process. I have done so to the best of my ability, but conclude in this case that, even considered together, the matters of which her clients complain do not yet warrant depriving the Claimant of his trial.

F. OTHER MATTERS

36. The Defendants' Application Notice also put forward a case, based on s.2(5) of the Crown Proceedings Act 1947, that they enjoy an absolute defence under that Act, at least to the slander claim. This point was not argued before me, but I permit them to reserve it and argue it at or before trial if so advised, without myself expressing any view one way or another on its merits.

37. Following the handing down of this Judgment I will hear consequential orders, directions for the future timetable of their action to trial, and provision for the costs of these Applications.