



Neutral Citation Number: [2005] EWCA Civ 824

Case No: A2/2004/0968 (B)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE EADY
[2003] EWHC 1461 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2005

Before :

LORD JUSTICE WARD
LORD JUSTICE SEDLEY
and
LORD JUSTICE LONGMORE

Between :

JONATHAN STEINBERG

- and -
PRITCHARD ENGLEFIELD & ANOTHER

Appellant
/Defendant

Respondents
/Claimants

Mr Steinberg the Appellant appeared in person.
The Respondent was not represented and did not attend.
Hearing date: 23 June 2005

Judgment

Lord Justice Sedley :

1. On 3 March 2005, following a hearing at which the respondent was represented by counsel but at which the appellant was neither present nor represented, the appeal in this case was dismissed. Reference may be made to the judgment at [2005] EWCA Civ 288 for the court's reasons. Mr Steinberg, the appellant, now seeks to have the judgment set aside.
2. By an oversight in the Civil Appeals Office, a report on the appellant's psychological state dated 4 January 2005, which had been received on 7 January, was not before the court. The report, which was submitted in relation to an impending application listed for 14 January, had been accompanied by a request that the matter should proceed in the absence of both parties. The two documents were placed before Peter Gibson LJ, who on 12 January 2005 directed that the hearing of the appellant's application for an enlargement of time for lodging his appellant's notice should proceed with ordinary rights of representation on both sides. It did so, and in Mr Steinberg's absence his application succeeded: see [2005] EWCA Civ 13. His substantive appeal consequently came before the court on 3 March 2005. The court declined to adjourn it, notwithstanding Mr Steinberg's absence, and determined it on the merits in the respondents' favour.
3. Ward LJ on 23 March directed that Mr Steinberg should elect whether he wanted the present application to set aside the judgment to be dealt with on notice in open court or (initially) without notice on the papers. Mr Steinberg by e-mails of 23 March and 1 April opted for the latter. Then by an e-mail of 10 May, he changed his election to an oral hearing. We have now listed that oral hearing, initially without notice, in order to decide whether it should proceed to a hearing on notice.
4. The application to set the judgment aside advances essentially two grounds: first, that it was wrong in principle to proceed in Mr Steinberg's absence; secondly, that it was wrong to do so having regard to the contents of the psychiatric report to which we have referred.
5. The court has already dealt with the first of these grounds in the judgment on the appeal. It affords no reason for reopening the case. As to the second, the question now to be addressed is whether, had it been included in the court's papers, the report of 4 January might have produced a different outcome. The difference in outcome for which Mr Steinberg contends is not substantive but procedural, namely an adjournment.

6. Dr Kim's report of 4 January 2005 records a history of an acute psychotic episode in October 2002 associated with this litigation, and of continuing episodes of panic, depression, insomnia and cognitive malfunction, all of them linked to the litigation and its consequences. The principal diagnosis is of severe depressive disorder. It has been treated with drugs and with psychotherapy. Dr Kim concludes:

“At this point, it seems to be impossible in his current mental status for Mr Steinberg to go back to court to face the legal battle in which he is involved. His anxiety coupled with persecutory ideation overwhelms him , and he is paralysed by such feelings..... Mr Steinberg's mental status does not allow him to go back to the courtroom. He should stay away from the legal battle for another 6 to 8 months.”

7. On the hearing of the present application Mr Steinberg has appeared in person, his emotional and psychiatric difficulties notwithstanding. He has asked the court to set aside the judgment which it gave in his absence on his substantive appeal against the decision of Eady J granting the claimants summary judgment in the libel action. His grounds are, in essence these. First, that it is contrary to justice to decide a case against a litigant in what can now be seen to have been his unavoidable absence. Secondly, had he been heard by counsel or in person, Mr Steinberg's appeal might have succeeded. Thirdly, therefore, the proper course is to set aside the judgment arrived at in his absence and rehear his appeal.
8. The first ground, it seems to me, is based on a misapprehension about absent litigants. A party is entitled to a fair chance of presenting his case: he does not have an indefeasible right to present his own case regardless of the delay and prejudice an indefinite adjournment may cause. Had Dr Kim's recent report been before the court on 3 March 2005, I do not think that it would – or could - have led the court to adjourn the appeal. It offered no prospect of Mr Steinberg's ever being able to conduct his own case or securing representation. This much was corroborated in his opening assertion to us that he was still not capable of presenting a comprehensive argument, though he was capable of instructing and being advised by solicitors and counsel if he could only afford to retain them. I am bound to say, however, that in the submission which he went on to make Mr Steinberg displayed all the articulacy of his profession with no sign of an inability to marshal arguments or respond to questions. Few litigants in person cope so well. However, his point was not that he could now cope: it was that, as Dr Kim had written in January, he could not.
9. The court's earlier decision to hear his appeal in his absence was, I recognise, a misfortune for him to which serious regard has to be had; but justice also required the interests of other parties and the public interest in finality to be taken into account. In this situation, the choice between proceeding with the appeal with the benefit (it should be remembered) of very full written submissions from Mr Steinberg and

letting it stand over indefinitely could only legitimately have gone in favour of proceeding even if Dr Kim's report of 4 January 2005 had been before us.

10. Let it be assumed, however, that the overlooked medical report might have led the court to adjourn the appeal. Our next task, before deciding to set aside the judgment, would be to see whether the grounds now advanced for allowing the appeal have any prospect of success.

11. I turn therefore to the fresh skeleton argument which Mr Steinberg has prepared for this purpose. He submits: -

“9. The appellant's underlying case is a good one in that the Claimant's case had on full inspection by the lower court judge (and without any representations being made by the Appellant/Defendant to those proceedings on the validity of the Claimant's case) been classified as potentially not amounting to a proper cause of action. Alternatively in the event that the Court considers that the alleged publication did amount to a technical cause of action, proceeding against a Defendant who the Claimant had learned through confidential information gained while instructed as a solicitor could not defend such action amounts to abuse of process as defined by Lord Phillips in *Jameel v Dow Jones*; that in such event this case is infinitely stronger than the *Jameel* case in that there was no suggestion of personal financial gain in *Jameel* whereas the Claimants/Respondents in this case are continuing this case and refused mediation solely for their own financial gain in recovering at their hourly rate for any time they could waste on motions, applications, enforcement proceedings, charging proceedings, possession proceedings and generally in these proceedings. The publication (i) generally (ii) by the Respondent/Defendant and (iii) to a third party should be viewed with extreme suspicion as no reasonable jury could find the Claimants have credibility when suggesting that their witness had come across the supposedly published letter on his own in view of the preponderance of evidence of abuse of process by the Claimants generally. As to the defamatory nature of the facts and matters set out in the letter, it is respectfully submitted that although strongly worded, on the evidence of the Respondent's conduct a jury might well come to the conclusion in private deliberation that those facts and matters were

both a true and justified description of the Respondent's actions throughout the proceedings.

10. The appellant's underlying case is a good one in that "It was disproportionate and an abuse of process for the claimant to proceed with his claim where there was no substantial tort, publication within the jurisdiction was minimal, damage to his reputation was insignificant", there was no suggestion of active publication by the Defendant (which publication was in any event denied) "and the facts did no justify the grant of an injunction prohibiting republication" in that firstly there was no suggestion of intention to publish or republish and the Claimants had never proceeded with any motion or application for an injunction. Moreover, the recognition by the Claimants that there was no need for an injunction in 1998 of an alleged defamation which had become "sterile" (per Eady J) by 2003 constitutes an acceptance that there had been no substantial publication, no damage, no intention to republish and no prospect of future damages. It is significant in this regard that the Claimants had put a request for an injunction in the Writ and then not proceeded with any motion or application for an injunction while they were claiming damage and potential damage to their reputation. It will be argued that the failure to proceed with an injunction belies the substance of this claim and underscored the proposed Part 20 Counterclaim. It will in practice be impossible for the Claimants to convince any reasonable jury that they had any knowledge of any third party publishees existing at the time of alleged publication when they served proceedings without stating to whom publication had been made and when they had not moved for an injunction while at the same time alleging damage to reputation arising out of alleged publication. Under those circumstances, their claim that a tort existed at the time of Writ must fail and a reasonable judge may deny the Claimants any right to have the matter adjudicated by a jury. The Claimant's inability on "specialist defamation counsel" advice to plead publication to a third party along with their opposition to the motion for further and better particulars of the alleged third party publishee and refusal to provide details of to whom they alleged publication had been made (at the hearing of the motion for which they were represented by that

“specialist defamation counsel” before Master Ungley) underscored the bad faith nature of the cause of action.

11. The Court ought properly to reconsider its decision in the light of the fact that there is no mention made in the judgment dismissing the appeal that the learned judge should have held that granting an application for summary judgment would infringe the Defendant’s right of access to court, which is a constituent element of the right to a fair trial as embodied in Article 6 of the European Convention on Human Rights. In particular, the Court should have considered whether the learned judge should have held that granting an application for summary judgment in circumstances in which a litigant has been unable to be present at trial through no fault of his own would be disproportionate to the aims of seeking to ensure finality and the efficient handling of the litigation, and was thus incompatible with the Defendant’s right of access to court under Article 6 (1).”
12. Mr Steinberg now adds a factual submission that no significant or meaningful publication ever occurred. None was proved, he says, and none could be inferred because the offending entry was not accessible by ordinary search engines. This argument was not dealt with by Eady J because it was not advanced to him. Mr Steinberg says his expert evidence would in due course have established its factuality; but he did not make even such a prospective claim to the judge. He accepts that it is only because of this court’s mention in its judgment of the decision in *Jameel v Dow Jones* that he now seeks to run the point.
13. Eady J, adjourning the application for summary judgment on 17 February 2003, mentioned that the publication appeared (he emphasised the verb) to have been very limited, if not technical. He noted that Mr Steinberg was seeking to translate the claimants’ reliance on the accessing of his website by a Mr Ford into a conspiracy to fabricate a spurious publication. He thought this far-fetched, and considered that it left little prospect of Mr Steinberg’s overcoming the evidence that he was responsible for publication to at least one person.
14. Mr Steinberg tells us that on medical advice he did not read this judgment. Had he done so, he now realises, he would have been alerted much sooner to a possible line of defence. Instead, when the adjourned application for summary judgment came back before Eady J on 18 June 2003, he was again absent and had advanced no such

argument. The claimants, by contrast, were relying on a pleaded case which included the following further information served pursuant to an order of Gray J:

“PARTICULARS OF PUBLICATION

- 1.1 From 20 February 1998 or a date shortly thereafter the Defendant posted on the World Wide Web and on his website “J.R Steinberg Esq International Law Consultancy” and at the address <http://www.internationallawyer.org/p63.htm> the words set out at paragraph 3 of the Statement of Claim. At a date unknown to the Claimants but not later than 17 June 1998 the Defendant added to those words on the said web page the words at paragraph 4 of the Statement of Claim.
- 1.2 On or about 17 June 1998 the said words were published to Mr Tony Ford, Senior Counsel at IBM United Kingdom Limited when he made a search of the Internet for references to “Pritchard Englefield” and was offered, read, downloaded and printed the web page containing the said words.
- 1.3 The web page containing the said words has been made continuously available by the Defendant since first being posted by him on the World Wide Web to persons making a search for references to the First Claimant. The Claimants will rely on searches made by them using the Infoseek and GO search engines on the following dates: 17 June 1998; 24 September 1998; 30 April 1999; 7 May 1999. The Claimants will further rely on such further searches as may be made before trial using the Infoseek, GO, Google and other search engines.
- 1.4 The Claimants will contend that since the said words were posted on the World Wide Web by the Defendant as aforesaid searches of the Internet have become a basic, common and increasingly popular means of obtaining information. Further (and for this reason) the First Claimant has throughout that period publicised its services on the World Wide Web by means of a web page on the website of Pannone Law group and since 23 June 1999 has also had its own website. Necessarily persons using the search engine to find references to and information about the First Claimant will have been offered (as in the case of Mr Ford) the Defendant’s web page containing the words complained of.
- 1.5 Further the Defendant has increased the likely number of publishees by inviting visitors to his website “J.R Steinberg Esq International Law Consultancy” to read the words complained of as follows. Visitors to the Home Page of that website have been invited, under the heading "Sample Briefs and Advice", to read “samples of briefs wholly prepared by this firm in recent years”. The third such “sample” published to persons taking up this invitation comprises the web page containing the words complained of.
- 1.6 In the premises it is to be inferred that a substantial but necessarily unquantifiable number of persons including clients, potential clients, competitors, potential competitors, professional opponents or prospective professional opponents of the First Claimant and persons visiting the Defendant’s “J.R Steinberg Esq International Law Consultancy” website will have accessed and read and/or will access and read the words complained of by virtue of the Defendant making them available on the World Wide Web.”

15. Eady J said this:

“I have in the past attempted to give every opportunity to Mr Steinberg to demonstrate why it is that finality should not now be achieved. He could have produced an expert report to show that there was some substance in his denial of liability for publication of the relevant offending words....

“I indicated in an earlier ruling why it was that I was sceptical about the prospect of resisting the claimant’s allegation that Mr Steinberg was responsible in law for the relatively limited offending publication. That scepticism has not been removed by anything which has subsequently emerged.”

16. It can be seen that the judge was not prepared to infer that publication had been widespread, but was equally unprepared to accept, absent rebutting evidence, that it had been negligible or merely factitious. Mr Steinberg’s new assertions apart, the situation as it was before Eady J remains the situation today.

17. None of this therefore open any new window or sheds any new light on the issues considered by us on the hearing of Mr Steinberg’s appeal on 3 March 2005. To reopen the appeal in order to entertain these further submissions, still unsupported by any evidence, would inexorably result in our dismissing the appeal once more and in doing so adding another five-figure tranche to the already massive tally of costs payable to the claimants.

18. Mr Steinberg has additionally sought today to reopen the question of the unavailability to him of public funding. That is not a legitimate element in his appeal: it is a prior issue which he has sought, but without success, to canvass in other forums including the European Court of Human Rights. Our concern has been with the merits of his appeal and his ability to conduct it in the absence, for better or for worse, of public funding.

19. For these reasons I would decline to set aside this court’s judgment of 3 March 2005.

Longmore LJ:

20. I agree.

Ward LJ:

21. I also agree.
22. Mr Steinberg applied for a stay of execution of the order of Eady J (or as he put it, an injunction to restrain enforcement proceedings being taken). I refused that application stating that reasons would be given at the time of judgment in his application to set aside our previous order. These in summary are the main reasons for that decision.
23. Pursuant to CPR 52.7 an appeal does not operate as a stay of any order of the court below. Here the appeal had been dismissed and the normal rule for no stay must, therefore, be applied with even more rigour. Having considered all the circumstances of the case and in particular the fact that the application to set aside our order was likely to be determined with little delay, I concluded that this application to set aside the order of the Court of Appeal would not be stifled if the stay were refused. If the application to set aside had succeeded so that the appeal became live again, then the application for a further stay could have been renewed. As it was, it seemed to me that greater injustice would be caused to the respondents through restraining them from enforcing their judgment than would be caused to the appellant by permitting the proceedings in the Chancery Division to take their course.
24. Enforcing extant judgments is in accordance with the law, it is necessary in a democratic society for the protection of the respondents who would otherwise be denied the fruits of their judgment and it is proportionate. There is, therefore, no unlawful interference by the court with the appellant's (or his mother's) Article 8 rights.