IN THE HIGH COURTS OF JUSTICE
QUEEN'S BENCH DIVISION

Case No: HQ08X01306

Room 13

Strand
London
WC2A 2LL

Tuesday 29th July 2008

Before:

THE HONOURABLE MR JUSTICE EADY

B E T W E E N:

TESCO STORES LIMITED

and

GUARDIAN NEWS & MEDIA LTD and ALAN RUSBRIDGER

Transcript from a recording by Ubiqus
Cliffords Inn, Fetter Lane, London EC4A 1LD
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MISS A PAGE QC & MR J RUSHBROOKE appeared on behalf of THE CLAIMANT
MR A CALDECOTT QC & MISS C EVANS appeared on behalf of THE RESPONDENT

JUDGMENT
(Approved)

MR JUSTICE EADY:

1. The libel action now before me arises from the publication in *The Guardian* newspaper of two articles published on 27th and 28th February of this year. The allegations concerned the Tesco Group including the particular claimant Tesco Stores Limited, which is the main United Kingdom operating subsidiary.

2. The suggestion was that it had set up an off-shore tax avoidance scheme to avoid some £1 billion of corporation tax. Alongside the libel action there is also a malicious falsehood claim.

3. The principal allegation, to which I have just referred, is accepted to have been false. The particular scheme in question did not involve the avoidance of corporation tax. The defendants also admit that the meanings pleaded by the claimant are defamatory. This would, therefore, on its face, appear to be a classic case for an offer of amends to be made under the provisions of ss.2-4 of the Defamation Act 1996.

4. The claim was issued and the particulars of claim were served on 4th April of this year. The defence was served on 16th May, an offer of amends having been made, I am told, some 21 minutes before service of the defence. The statute of course provides that an offer of amends under the regime can only be made prior to service of the defence.

5. The defendants seek to rely upon the offer having been made as a defence in accordance with the provisions of s.4.2 of the Act. To this moment, on July 29th, the offer has neither been accepted or rejected by the claimant despite various requests on behalf of the defendants for clarification of its position.

6. On the defendants' case the scheme in question, which was the subject of the articles in February sought to achieve a different form of tax avoidance, namely in relation to stamp duty land tax (or "SDLT") relating to property transactions carried out by Tesco within the United Kingdom. It is the defendants' case that the avoidance by Tesco in this respect ran not

to a billion pounds - or anything like it - but to tens of millions of pounds. According to the defendants, this is a species of tax avoidance which has regularly been the subject of criticism by government ministers and by the Treasury.

7. Having its back to the wall in this sense, therefore, *The Guardian* published articles on 3rd May of this year, the object of which was to make clear that the initial allegations of corporation tax avoidance had been untrue but that Tesco was in fact engaged in SDLT avoidance. It is right to record that the claimant has not issued any separate proceedings so far in respect of those articles.

8. It is of the essence of the claimant's malicious falsehood claim that the defendants are accused of dishonesty in having published the original articles in February knowing, it is said, full well that the allegations about corporation tax avoidance were false. That accusation appears to be levelled both at the corporate entity which was the publisher of *The Guardian*, namely Guardian News & Media Ltd, and also against the editor Mr Rusbridger.

9. That stance of the claimant alleging dishonesty on the part of the defendants has been reiterated on a number of occasions in public pronouncements of various kinds. It so happens that the defendants have now become aware of two tax avoidance schemes which are directed, so it is said, to the avoidance of corporation tax. These are operated by Tesco in Luxembourg and Switzerland. It is recognised, needless to say, that these are completely different from the scheme which formed the subject matter of the original articles.

10. The schemes to which I have just referred in Luxembourg and Switzerland were reported in editions of *Private Eye* on 27th May and 10th June. So far the claimant has not issued any proceedings against *Private Eye* in respect of those articles. These matters are, however, said to be relevant to the defendants' case in meeting the claimant's claim for damages. On 27th June notice was given by letter of the defendants' intention to amend the pleading in these respects.

11. It is accepted that, for the purposes of assessment of damages or compensation as the case may be, the defendants are entitled to raise, at any rate, the SDLT matters but not the newly-discovered corporation tax schemes. That is one of the issues which I shall have to consider shortly. The most substantive debate over the last two days has taken place, however, in relation to the first two issues which I have to resolve. They are interrelated; namely whether the claimant should now be compelled to elect either to accept or to reject the offer of amends, and secondly, whether the malicious falsehood claim should now be stayed as serving no useful purpose.

12. It is said that the essence of the claimant's complaint is of injury to reputation. That is a matter for defamation proceedings, as was confirmed by Nicholls LJ in *Joyce v Sengupta* [1993] 1 WLR 337. All remedies to which the claimant may be entitled in that respect can be obtained in the libel claim.

13. There is no head of damage recoverable in malicious falsehood, it is submitted, which the claimant cannot recover in the defamation claim. The defendants submit that the malicious falsehood claim is therefore only extant for tactical reasons. The claimant has adopted the stance that it is entitled to keep the offer of amends open as long as it wishes for acceptance or rejection. Moreover, even if it accepts the offer and obtains an apology and damages under the statutory scheme, it submits that it can go on and obtain a decision on the malicious falsehood issue for no better reason than to have the court's finding on malice.

14. The philosophy underlying Parliament's introduction of the offer of amends regime contained in ss.2-4 of the 1996 Act was to enable the parties in defamation proceedings, or even prior to the issue of proceedings, to achieve a relatively speedy and relatively inexpensive disposal of a complaint of injury to reputation, where the defendant was prepared to acknowledge that it had published defamatory allegations which were essentially inaccurate.

15. This would serve the claimant's interests because it would provide a mechanism for the

reputation to be restored in respect of the allegations complained of, either on a mutually agreed basis or on terms to be determined by the court in accordance with s.3.

16. The statutory scheme was intended to impose discipline on the parties, in the sense that the complainant would have little choice but to accept an offer of amends in order to achieve vindication or reject it and take on the burden of proving malice, with a view to obtaining a verdict following a trial (with or without a jury). Only if malice is proved would the claimant be able to overcome the statutory defence under s.4(2) and recover damages assessed in the traditional way.

17. That would be the only issue in the case on liability, since a defendant relying on a s.4(2) defence is precluded from relying on any other defence such as qualified privilege, justification or fair comment. That is because the making of an offer of amends itself recognises that the claimant has been wronged by the publication and is entitled to be compensated. Where an offer is not accepted, the focus inevitably shifts on liability to the defendants' state of mind and whether the publication was motivated by malice in the sense explained by Lord Diplock in Horrocks v. Lowe [1975] AC 135, 150.

18. The Act provides in ss.3 and 4 for two alternative outcomes. If the offer is accepted, the s.3 mechanisms come into play. If it is not accepted, the statutory defence becomes available and the other consequences set out in s.4 come about. Miss Page QC appearing on behalf of the claimant argues that notwithstanding the statutory defence under s.4(2) her client can accept the offer of amends at any time and thus effectively deprive the defendants of the benefit of the enactment.

19. As to the amount of compensation to be recovered, whether an offer of amends is accepted or rejected the same principles govern the admissibility of evidence and, in particular, so far as matters of aggravation and mitigation are concerned. Thus it is inappropriate for a complainant to exclude relevant matters concerning the circumstances of publication, or for

example general bad reputation, just as it is impermissible for a defendant to seek to justify by the back door by introducing instances of supposed misconduct on the claimant's part in contravention of the rule in Scott v. Samson [1882] 8 QBD 491.

20. Although Sir Brian Neill's report on defamation practice and procedure recommended the abrogation of that rule in 1991 Parliament declined to accept that point and the courts must continue to give it effect, albeit in the light of guidance on its interpretation, given subsequently in a number of Court of Appeal authorities.

21. The offer of amends regime was intended to be conciliatory in its effect and requires the parties to operate it in a constructive manner. Since its enactment an additional spur has been provided in the form of the CPR and the court's focus upon narrowing the issues and achieving a fair resolution of the "real issues" between the parties as effectively as possible.

22. It hardly needs to be stated that if it were possible to bypass the disciplines of ss.2 and 4 of the Act altogether by pleading malicious falsehood in parallel specifically for that or some other tactical purpose Parliament's intention would be undermined. Insofar as there remains any uncertainty as to what the legislative intention was, the court is required to resolve that by interpreting the provisions compatibly with the values of the European Convention on Human Rights and Fundamental Freedoms.

23. One of the main purposes underlying the enactment was to afford an additional defence to journalists; specifically of course those who had got their facts wrong but were willing to make amends. An interpretation of the Act which undermined that purpose would tend, therefore, to undermine indirectly the right of free expression protected by Article 10.

24. To compel or encourage a claimant to take advantage of the statutory regime, once an offer has been made, does not undermine either its Article 8 rights or its Article 6 rights. On the contrary, they are advanced because restoration of reputation can be achieved via the court's processes more quickly and less expensively (it is hoped). The objective in a libel action is to

achieve the restoration of reputation and that must not be obscured by seeking to obtain some collateral or tactical advantage. That would be to use the court's processes for an inappropriate purpose.

25. It may be, if litigation takes its conventional and more cumbersome course, that other objectives may be achieved on the way which serve commercial or public relations objectives for example. But they must be regarded as incidental to the true purpose for which the court's processes are made available.

26. In a libel action that is simply about restoration of reputation and compensation for any damage or loss that can be proved. If that is achieved, it is no part of the court's function to punish or humiliate the other party, or to provide an opportunity to achieve additional public relations purposes.

27. The statutory provisions have to be construed so far as possible in a way which makes them workable and in a way that is consistent with the obvious underlying purpose. It has to be asked what substantive and legitimate purpose is served in the present litigation by the continuance of the malicious falsehood claim.

28. The conclusion seems to be that it is intended to achieve one or more tactical purposes, since it cannot afford any substantive remedy in respect of reputation; that is the function of defamation proceedings. Any damages to which the claimant may be entitled as a result of the Guardian's publications can be recovered in defamation.

29. For over two months now there has been an opportunity to recover appropriate compensation either through negotiation or, following acceptance of the offer, by means of an assessment by a judge under s.3. The claimant's lawyers, however, while not wishing to prejudice that opportunity, nevertheless desire to press on at, no doubt, great expense and at the cost of considerable delay for no better reason than to establish malice, yet not as a means to proving its entitlement to vindication or compensation. They could do that merely by walking through

an open door, provided by the offer of amends. They wish to prove malice for its own sake but they do not wish to make the election Parliament intended by rejecting or, in the statutory phrase, "not accepting" the offer. They wish to keep the offer open nevertheless and still to prove malice.

30. If that strategy is legitimate in this case, it would also be available to any libel claimant who had been made an offer. It would drive the proverbial "coach and four" through the regime enacted by Parliament. In this case the defendants have recognised for some time, without qualification, that the allegations complained of were simply untrue. It is consistent with their position to rely solely on the s.4(2) defence and eschew any other substantive defence.

31. As I pointed out in argument, however, there could be other defendants (in other cases) who were prepared, in order to achieve finality, to make an offer of amends and accept the consequences - albeit it in circumstances where they might have chosen before the offer of amends regime came into effect in 2000 to advance a plea of fair comment or a plea of justification. In such a case, if Miss Page's argument is correct it would be possible for the claimant to press on and try to bring home a malicious falsehood claim while compelling the relevant defendant to keep open his offer of amends while at the same time confining him effectively to rely on a s.4(2) defence in libel. He would not be able to plead justification in the alternative, even though in the malicious falsehood claim the claimant would have the burden of proving falsity (unless of course it was admitted).

32. Yet, in the hypothetical circumstances I am putting forward, the defendant would have no incentive to admit falsity. The issues of truth and falsity would therefore take up time and resources in the malicious falsehood claim when there would be no useful purpose. Because of the offer of amends, the claimant would be able to achieve the only legitimate objective; that is to say, of having it acknowledged that the allegations were untrue and of being appropriately compensated. There would be no purpose served in that case by allowing the

claimant to go on, any more than in the present case, purely to have the chance of proving malice. It would be entirely superfluous. No more damages could be recovered (since it would be the claimant who chose to press on to trial) and there would be no greater opportunity of obtaining injunctive relief.

33. There has been an argument faintly advanced that the test of malice in the context of the claim for malicious falsehood is not entirely coextensive with that for the malice which has to be proved in order to defeat a s.4(2) defence under the statute.

34. In reality however, one has to consider the practical possibility of whether or not a claimant could succeed on one test for malice but fail on the other. Those circumstances seem remote, to say the least, and the court must focus, so far as possible, on approaching the resolution of the issues between the parties on a realistic and practical footing.

35. The questions therefore need to be answered in the days of the CPR, 'Why should this be allowed to happen in the present case? Why should the court not prevent its processes being diverted to allow the pursuit of pointless objectives?'

36. Parliament has decided that claimants can be permitted the luxury of proving malice once an offer of amends has been made, but only at the price of foregoing the chance of utilising the offer of amends regime. It is true that the statute refers only to an offer being accepted or not being accepted. It does not use the term "rejected" but that is plainly what Parliament had in mind. It would make a nonsense of the underlying policy if it were possible for a claimant to go ahead with proving malice while keeping the offer available until the conclusion of the trial.

37. Nothing in the drafting suggests such a possibility. Moreover, as a matter of general public policy, it has long been recognised that one should not "blow hot and cold" in litigation by adopting contrary positions, see e.g. the observations of Sir Nicolas Browne-Wilkinson V.-C. in Express Newspapers v. News Ltd [1990] 1WLR 1320 at 1329.

38. It would be inconsistent to keep open the option of accepting the offer while going ahead with alleging malice. That was plainly not what Parliament intended.

39. The court is not powerless to deal with this situation. There is a general power, now embodied in CPR 3.1(2)(f). The court should positively narrow the issues to enable it to resolve only those which are necessary to a fair and proportionate outcome. One should attempt to isolate the 'real issues' between the parties. As I suggested in McKeith v. News Group Newspapers Ltd. [2005] EMLR 32, in the light of such cases as Polly Peck v. Trelford [1986] QB 1000 and Rechem v. Express Newspapers, *The Times*, 19th June 1992, this requires a non-technical approach, which is not necessarily to be tied laboriously to the pleadings.

40. So here I need to identify the real issue; namely, the need for the claimant to achieve vindication in respect of the words complained of. That can be done through the route of the offer of amends regime with the court assessing compensation, if that is necessary, by applying the traditional rules appropriate to that exercise, as augmented in recent years by the guidance in cases such as Burstein v. Times Newspapers [2001] 1WLR 579, Turner v. News Group Newspapers [2006] 1WLR 3469 and Warren v. Random House [2008] EWCA civ 834.

41. How is the court to approach the question of time limits in the absence of any statutory provision? Mr Caldecott QC appearing for the defendants has pointed out the contrast with the wording in the CPR Part 36, where provision is expressly made for a party to take up a Part 36 offer at any time up to the commencement of the trial. There is no such express provision in the 1996 Act. It is therefore to be assumed, he submits, that Parliament intended there to be flexibility and that the test should be reasonableness.

42. By analogy with the law of contract, it is reasonable to suppose that the decision to accept or reject must be taken within a reasonable period. What is "reasonable" is likely to depend on the particular circumstances of the case. Here, for example, it would have been unreasonable

to compel the claimant to accept or reject the offer in the 21 minutes remaining before service of the defence on the 16th of May.

43. Sometimes, as the case of Rigg v. Associates Newspapers Ltd. [2004] EMLR 4 illustrates, it is reasonable for a claimant to explore the exact nature of the offer and the consequences of accepting it. That will usually be done in an exchange of correspondence but may extend, in particular circumstances, to obtaining an order for disclosure, but purely for the purpose of evaluating the offer. Here, if the claimant wishes to prove malice, the burden will be fairly and squarely on it to discharge that. It is not legitimate to hold up the decision whether to accept or reject the offer to call for information, or disclosure of documents, relating to the defendants' state of knowledge or the quality of its journalism.

44. It would not be reasonable to delay for those purposes. The whole point of the offer of amends procedure as the Neill committee expressed it, and as Parliament adopted it, was to provide assistance to journalists who found themselves "over a barrel" because they had got their facts wrong.

45. The regime enables them to climb off the barrel by putting their hands up and making an offer of amends. The claimant has to accept the offer or else take on the risks of overcoming the statutory defence by proving malice. That is a tough choice for claimants sometimes, but so it was meant to be. It is not simply to provide the claimant with a wider menu of options.

46. The s.4(2) defence is a defence on liability. It is wholly unrealistic to suggest that the offer can be kept open, at the option of the claimant, until judgment or just before it so that the claimant can see how the trial goes. If the cross-examination of the journalists does not go too well, the suggestion seems to be that the claimant could, at that point, simply pull the plug on the statutory defence by accepting the offer and be subject only to adverse costs orders. That would be to bypass the discipline intended by the Neill committee, and adopted by Parliament.

47. Some support was sought to be derived by Miss Page from the Scottish decision of Moore v. Scottish Daily Record and Sunday Mail Ltd. [2007] CSOH 24, but I am not bound by that decision and, with respect, I do not find its reasoning persuasive. There comes at some point a fork in the road. A claimant has to go to the right or the left and, depending on that choice, either the s.3 or s.4 will come into operation.

48. That choice cannot be postponed indefinitely. It is even more unreal to suggest that, even where an offer is accepted, the claimant can go on to allege malice nevertheless by means of a claim for malicious falsehood. That would simply be to enable a claimant to thumb its metaphorical nose at the legislative intention. It would mean that the discipline would simply be rendered ineffective. There is no right to plead a cause of action just because it exists. The court is there to do justice and, especially nowadays under the CPR, to have regard to the overriding objective. Litigation is no longer intended to be regarded as a game for lawyers; it is a means provided by the state of achieving justice for the parties, which almost always is going to be imperfect and to involve compromises. It was the need for compromise which underlay the offer of amends regime.

49. Reference was made by the Master of the Rolls at the Court of Appeal stage in the Ashley case to the fact that it is not acceptable to regard a claimant as having an unqualified right to pursue a cause of action for its own sake. It all depends on the particular circumstances and whether or not there is a realistic and tangible advantage to be gained.

50. The case of Ashley was referred to by both counsel. The House of Lords held that there was a legitimate potentially vindicatory purpose in permitting the battery claim to proceed, notwithstanding the admissions of the Chief Constable on negligence and damages. Here there is no legitimate objective in my judgment in pressing on with the malicious falsehood claim. Indeed to do so would be inconsistent with the plain intention of the 1996 Act.

51. The malicious falsehood claim must, in my judgment, be stayed forthwith. It remains to be

decided what is the reasonable period, on the facts of this case, within which the claimant should decide to accept or reject the offer of amends. There is plainly a strong case for saying that it expired long ago and that the claimant should now try to overcome the statutory defence under s.4(2) by proving malice.

52. As Mr Caldecott submits, however, the claimant has proceeded hitherto on a misunderstanding of the legal position and should not be penalised for that. The interests of justice would be served, even now, by giving it the opportunity to accept the offer of 16th May and to achieve such vindication as is available under the statutory regime. There needs to be an opportunity also for the claimant to consider the proposed amendments to the defence, to which I shall come shortly, and the introduction relatively recently of the SDLT matters, to which consent has been given by the claimant on the basis that it is at least arguable.

53. The other application which I have to resolve today relates to the desire of the defendants to plead the corporation tax schemes to which I referred earlier as something relevant to the issue of quantification of loss either in the litigation or under the offer of amends regime. I am going to determine that in a few moments, but the outcome of that is plainly something which the claimant needs carefully to consider, because it would be relevant to the implications for it of accepting or for that matter rejecting the offer of amends.

54. That is a relevant factor to take into account in deciding what is a reasonable period within which to make that decision in this case. I turn therefore to deal very shortly with the application which has been argued before me this afternoon in relation to the corporation tax scheme.

55. Parties in defamation litigation have now had to labour for some time, as have judges also, with the true implications of the decision of the Court of Appeal in the case of Burstein v. Times Newspapers in 2001 (cited above). It has been observed on a number of occasions that the true ratio of that decision, or its ratios, are by no means easy to divine. Similar comments

have been made in such cases as Turner v. News Group Newspapers and more recently in the Random House case.

56. As I think I said in a case some years ago, against that background one has to be very careful as a judge at this stage of proceedings in shutting out matters which may be arguable in the context of Burstein and the principles it expounds: see e.g. Birchwood Homes Ltd v. Robertson [2003] EWHC 293.

57. I have been asked to exclude the corporation tax argument from that debate. It is said by Mr Caldecott that it goes to directly relevant background context and is also necessary for the court to take into account, as and when the time comes, to ensure that it does not make a decision on damages "in blinkers". Those are phrases which come from the Court of Appeal's decision, and in particular the judgment of May LJ, in Burstein and they have been echoed in subsequent cases.

58. It is said also by Mr Caldecott that the subject matter of the original libel is coextensive with the subject matter of the proposed plea on the corporation tax schemes. They are sufficiently closely related for them to be relevant to the issue of compensation. Miss Page has argued to the contrary and sought to draw a distinction between different types and different levels of tax avoidance. It seems to me, however, in the light of the authorities, that I must here err on the side of generosity at this stage. I will allow the amendment to be made as an arguable matter at the pleading stage. That is not to say that it will necessarily be permitted by the judge, if it comes before a judge in due course. Matters of relevance and admissibility and proportionality will be for the judge to decide, of course, but it seems to me as a pleading matter it is legitimate for it to be raised. In the light of that, as I said a few moments ago, the claimant will be fully entitled to take that into account to decide what the implications are for it in either accepting or rejecting the offer made on 16th May. I will hear counsel as to what might be considered on these particular facts to be a reasonable period for allowing that

choice to be made.

59. I particularly of course will also take into account the fact that the long vacation is imminent.
