Neutral Citation Number: [2007] EWHC 3062 (QB)

Case No: HQ06X03905

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2007

Before:

THE HON. MR JUSTICE EADY

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Between:

Frank Warren	**Claimant**
- and -	
The Random House Group Ltd	**Defendant**

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- -

Adrienne Page QC and William Bennett (instructed by **Carter-Ruck Solicitors**) for the Claimant
Desmond Browne QC and Matthew Nicklin (instructed by **Simons Muirhead & Burton**) for the Defendant

Hearing date: 12th and 13th December 2007

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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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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. This case has led to a plethora of interlocutory applications, taking up recently three days before Gray J and two days before me. The costs incurred have been very large for what has been achieved.

2. The matter I now have to address is the extent to which a contractual dispute between Mr Ricky Hatton and Mr Frank Warren is relevant to any of the allegations complained of by Mr Warren in Mr Hatton's ghosted autobiography.

3. Ms Page QC argued that the complaint gives rise to a relatively narrow issue and objects to the way in which it has been dealt with in the Defendant's existing defence and in proposed amendments. I have dealt together with Ms Page's strike out application and the Defendant's application for permission to amend. The point of principle should be determinative in both cases.

4. The particular passage complained of, from pages 246-247, which obviously has to be read in its proper context, is as follows:

> "Frank then accused me of being greedy in his column in the *News of the World*. He said he had made me £6 million in the ring from 39 fights and now, just as I was making some serious money, I had pulled the plug on him. The whole basis of the piece was how Frank had been wronged by a greedy, ungrateful, selfish little tosser like me, who would never have made it in boxing without his faithful, guiding hand.
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> I found his comments unbelievable. I don't really want to go into detail about what I have earned from boxing, but, believe me, it is nowhere near £6 million. Billy gets 10 per cent of what I earn and dad looks after the rest. That's all I know".

5. The Claimant's pleaded meaning is:

> "… that the Claimant had lied to the readers of the *News of the World* in order to do down Ricky Hatton when he had informed them that Ricky Hatton had made £6 million in the ring from 39 fights".

6. The Defendant seeks to justify a *Lucas-Box* meaning to be found in paragraph 5(2) of the defence to the following effect:

> "that the Claimant … had engaged on a public campaign (including using his column in the *News of the World*) to promote knowingly false and/or misleading information about Ricky Hatton in support of his dishonest claim to have had a contract to act as Ricky Hatton's promoter, during which campaign he wrongfully revealed in the media highly confidential information about Ricky Hatton's alleged earnings".

7. Essentially Ms Page complains of the apparent attempt to incorporate (or "drag in") the issues of whether or not the Claimant had a contract for promoting Ricky Hatton at the material time and whether there was a "public campaign" in which he had made dishonest claims on the subject. Not only is the *Lucas-Box* meaning impermissibly wide, she submits, but it is an attempt to relitigate a commercial dispute which has already been the subject of proceedings both in a contract claim and in an earlier libel action between Mr Warren and the Hattons. She argues that the Claimant is entitled, in accordance with his own pleaded meaning, to confine the issue to the relatively narrow one of whether he gave a deliberately misleading impression of Ricky Hatton's earnings in breach of confidence and "to do him down". Thus not only would the detail of the contractual dispute be irrelevant to the complaint, but it would also hugely extend the cost and scope of the present litigation.

8. A governing principle is that the court should ensure, so far as possible, that the case is confined to the real issue between the parties. It has been recognised increasingly over the past 20 years, even before the advent of the CPR, that it is sometimes necessary to look behind the statements of case in order to identify the true issue: see e.g. *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000; *US Tobacco v BBC* [1998] EMLR 816 (the decision in fact dating from March 1988); *Rechem International Ltd v Express Newspapers Plc*, *The Times* 18 June 1992; *Cruise v Express Newspapers Plc* [1999] QB 931; *McKeith v News Group Newspapers Ltd* [2005] EMLR 780.

9. It is important, in a case such as this, to determine whether the defamatory meaning to which the claimant seeks to confine the dispute is truly severable and distinct from that which the defendant wishes to justify.

10. Obviously, if a claimant pleads a general meaning, such as "dishonesty", he can hardly be surprised if the defendant seeks to justify by reference to relevant aspects of his conduct irrespective of whether they find mention in the words complained of. On the other hand where, as here, the particular meaning pleaded is in narrow and specific terms, it will be less easy for a defendant to choose his own ground on which to fight.

11. I turn first to the well known judgment of O'Connor LJ in *Polly Peck*, cited above, at 1020-1021:

> "The first principle is that where a plaintiff chooses to complain of part of a whole publication, the jury is entitled to see and read the whole publication: this is unchallenged and has been the law for well over 150 years. What use is the jury permitted to make of the material now in evidence?
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> There is no doubt that they can use it to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed. A classic example of the context deciding the meaning of words to be different to their face value meaning is found in *Thompson v Bernard* (1807) 1 Camp 47, a slander action where the plaintiff complained that the defendants said of him: 'Thompson is a damned thief; and so was his father before him; and I can prove it.' The evidence was that the defendant added: 'Thompson

> received the earnings of the ship, and ought to pay the wages.' Lord Ellenborough CJ directed a non-suit on the ground that that it was clear from the whole conversation that the words did not impute a felony, but only a mere breach of trust.
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> What other use can be made of the material depends on its nature and on the defences put forward by the defendant.
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> The second principle is that where a publication contains two distinct libels, the plaintiff can complain of one and the defendant cannot justify that libel by proving the truth of the other. The difficulty with this apparently self-evident proposition is in deciding whether the two libels are indeed distinct in the sense that the imputation defamatory of the plaintiff's character in the one is different from the other.
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> The third principle is that it is for the jury to decide what the natural and ordinary meaning of the words complained of is. This simple proposition has become enmeshed in the question how far the plaintiff can, by his pleading, limit the meanings which may be canvassed at the trial.
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> The fourth principle is that the trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties".

12. Later in the judgment, at p.1032, his Lordship addressed the specific problem with which I am now concerned:

> "… In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him, and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different from that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and to give particulars of the facts and matters upon which he relies in support of his plea, as he is required to do … It is fortuitous that some or all of those facts and matters are culled from parts of the publication of which the plaintiff has not chosen to complain.
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> Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.

> Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication.
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> … In all cases it is the duty of the court to see that the defendant, in particularising a plea of justification or fair comment, does not act oppressively. Whether the particularisation of the plea is oppressive depends not only on the facts of each case, but also on the attitude of the plaintiff. I say this because a plaintiff can limit the extent and cost of inquiry at trial by making timely admissions of fact."

13. One of the authorities to which O'Connor LJ had referred in *Polly Peck* was the decision of the Court of Appeal in *Waters v Sunday Pictorial Newspapers Ltd* [1961] 1 WLR 967, which was in those days recognised as clear authority for the proposition that particulars justifying any meaning which the words are reasonably capable of bearing will not be struck out. He also cited *S & K Holdings Ltd v Throgmorton Publications Ltd* [1972] 1 WLR 1036, at 1039-1040, where Lord Denning MR had observed:

> "Even if the plaintiff has not complained of the whole, but only of part, the judge will let the jury see the whole. He must indeed do so, for the very purpose of enabling them to decide what is the natural and ordinary meaning of the words in their context. If the jury are entitled to see the whole, they should be allowed to know what each side says abut the whole: and in particular, whether they say it is true or not.
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> … It seems to me that, in cases where the jury are entitled to see the whole, the defendants are entitled to plead justification or fair comment as to the whole. In my opinion therefore these particulars of justification are admissible. They should not be struck out. I realise that this may mean a lengthening of the trial, but that has to be put up with. If the defendants fail to prove them, they will have to pay the costs; but I do not think we can strike them out. I think therefore the appeal should be dismissed".

14. As a result of later appellate decisions, however, it would not be right to proceed, without qualification, on the basis that either (a) a defendant may justify any meaning which the words are reasonably capable of bearing; or (b) that simply because a jury may be entitled to see the whole of an article "they should be allowed to know what each side says about the whole: and in particular, whether they say it is true or not". The courts have adopted a more restrictive approach in recent years, and have emphasised the need to focus on the real issue between the parties without spending time and money on extraneous or peripheral matters.

15. An important case in this context is the decision of the Court of Appeal in 1988 in *United States Tobacco International Inc. v BBC* [1998] EMLR 816. It was a striking example of the court's willingness to impose discipline by restricting the scope of the defence even in a case where the meaning sought to be justified by the BBC was, indisputably, to be found in the words complained of themselves.

16. US Tobacco manufactured oral snuff and chewing tobacco. In the BBC programme *That's Life* there was an item about the corporation's marketing of a product called "Skoal Bandits" in the United Kingdom. It was criticised for organising a sales campaign aimed at children. The British government was also criticised for permitting this to happen. The government had insisted that the corporation enter into an agreement with the Department of Health restricting the marketing of the product and forbidding the promotion of sales to young people. It was alleged in the programme that the product was in fact being marketed aggressively to children, almost like sweets, and that accordingly its employees had acted in breach of the agreement. Another important theme of the programme was that the product was carcinogenic and especially likely to cause mouth cancer.

17. In its pleading US Tobacco complained of the allegation that it was in breach of its agreement with the Department of Health – but not of the charge that it was marketing a potentially carcinogenic substance. Nevertheless, because it was inextricably entwined, the statement of claim included sections of the programme transcript which embraced both allegations. The BBC sought to plead justification to the health risk allegation and this was struck out both by the master and the judge. The BBC appealed unsuccessfully to the Court of Appeal, where the relatively recent decision in *Polly Peck* was applied. The court did not accept the argument based on *Waters v Sunday Pictorial* to the effect that the defence could justify the allegation of carcinogenicity because it appeared in the words complained of. Moreover, even though the jury were inevitably going to see the whole programme, they were not entitled to know what the BBC said about this particular allegation (i.e. that it was true).

18. The court's approach was explained by Russell LJ at pp. 830-831:

> "This action will be tried by a jury. The fundamental question we have to answer is whether justice can be achieved, and in particular fairness to the defendants, by restricting the issue upon which the jury's verdict will depend to the alleged breach of agreement particularly as that affects young people, or whether it is necessary to open up and litigate the much wider issue as served by the BBC, namely that the plaintiffs are marketing a product which presents a serious risk to health. I recoil from the idea that the answer depends upon the precise form that the statement of claim takes when it is common ground that the plaintiffs seek to restrict the issue. In practical terms the difference is between a trial that should be disposed of in days as opposed to a trial that I suspect could take weeks or months with a wide range of experts called on each side. The courts should not be placed in the position of providing a forum for a crusade, however well intentioned".

19. The court did not ignore the apparent difficulty of principle, and it was expressly recognised that the risk to health was an inherent part of the BBC's accusation. The matter was explained by Nicholls LJ at pp. 826-827:

> "… I turn to consider whether the so-called 'health risk issue' – charge (a), as I have labelled it – raises a distinct and separate defamatory allegation. In one sense it does. Charge (a) is concerned solely with the health risk qualities of the product which the plaintiff company is admittedly making and selling, whereas charges (b) and (c) are concerned principally with one particular aspect of the marketing of the product. The main thrust of the two criticisms, the sting of the two libels, is different. If the BBC proves at the trial that the product has been promoted to children as asserted in the programme (charges (b) and (c)) the action will fail, regardless of whether the product does indeed pose a serious risk to health (charge (a)). Conversely, proof that the product, to the plaintiff company's knowledge, poses a serious risk to health (charge (a)) cannot, on any conceivable meaning of the words used in the programme, afford the BBC a defence if it fails to prove any marketing and promotion to children.
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> But, despite this and despite [counsel's] submissions to the contrary, in my view charges (b) and (c) are not wholly independent of charge (a). [Counsel] submitted that the nature of the product was irrelevant in this action. Somewhat inconsistently, he also submitted that the admission was made in order to be fair to the BBC. I do not see how fairness can require an admission on a point which is irrelevant to the issues in the action.
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> The reason why I consider that charges (b) and (c) are not wholly independent of charge (a) is that *part* of the sting of the libel in charges (b) and (c) lies in the nature of the product. Marketing a product in a manner likely to attract the attention of young people would, in itself, be an innocuous allegation. The sting lies in the allegation that this particular product, to the knowledge of the plaintiffs, is dangerous to health. The nature of the product is an integral part of the allegation. Likewise with charge (c): the assertion that the plaintiffs have broken an agreement with the DHSS in their marketing of Skoal Bandits acquires added sting from the nature of the product which, it is said, is being marketed so as to attract young persons. In my view, one of the elements, and a not unimportant element, in the accusation of such marketing is that the product in question, to the knowledge of the plaintiffs, is dangerous to health."

20. US Tobacco was offering to make certain limited admissions, which were amplified or clarified in the course of the hearing of the appeal, to the effect that:

i) they manufacture, market and distribute a product known as Skoal Bandits which is alleged by many doctors to pose a serious risk to health (including a possible risk of cancer of the mouth) and by some to be addictive;

ii) that they know of these allegations; and

iii) that there is a considerable scientific controversy as to whether or not smokeless tobacco poses a serious risk to health.

There was no admission that the product actually posed a risk to health.

21. This was something of a compromise and not entirely logical since, as had been argued on behalf of the BBC, factual assertions are only normally admitted before the court, whether by way of evidence or by way of concession, if those facts are relevant to a pleaded issue. It was suggested that the only basis for the concession being made was that the BBC was pleading justification or fair comment on the footing that Skoal Bandits did indeed create a health risk. It would appear that, unless the BBC was permitted to plead to the health risk, the limited admission of US Tobacco would be irrelevant. While accepting the logic of this argument, Nicholls LJ thought that the justice of the case would be met if the jury were made aware of the limited admission. There would then be "ample material before the jury on which they can make an award of damages and on which should they wish to do so, and should it be proper for them to do so, they can register any disapproval they may feel in the way sought by the BBC".

22. The question of relevance sometimes merges with one of efficient case management. As Neill LJ observed in *Rechem International*, cited above:

> "A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other hand the costs which may be involved if every peripheral issue is examined and debated at the trial."

23. The decision in *US Tobacco* was examined and followed a decade later by the Court of Appeal in *Cruise v Express Newspapers Plc* cited above, where at pp.954-955 Brooke LJ said that the court found it of great assistance. He continued:

> "In my judgment, Nicholls LJ correctly set out the relevant principles in his judgment in that case. I share his unwillingness, and that of Russell LJ, to accept that the length and cost of a libel action must be greatly extended simply because it is not easy for a pleader to extricate the sting or stings of which his client complains from the words surrounding them, which may contain a quite separate and distinct sting. The leading judgments of this court from *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161 onwards have been concerned to control the scope of this type of litigation, and I can see no logical basis for the supposed rule for which [counsel] contended. It is no defence to a charge that 'You called me A' to say 'Yes, but I also called you B on the same occasion, and that was true,' if the second charge was

> separate and distinct from the first. It may in any given case be difficult to decide whether the two charges are indeed separate and distinct …, but whether they are or not is a question of law which can conveniently be determined on interlocutory application of this kind."

24. The case concerned the actors Tom Cruise and Nicole Kidman, who had brought proceedings in respect of an article which referred to their adherence to the Church of Scientology, of which they did not complain, but also contained other "offensive" allegations which were held to be "totally distinct".

25. By contrast with the facts of *US Tobacco*, it is important to note that the words complained of by Mr Warren in this case do not include anything about the contractual dispute or the conducting of a "public campaign". The *Lucas-Box* meaning is said by Ms Page to be an example of creative pleading, designed to shift the ground away from the Claimant's actual complaint and on to a different issue which the Defendant wishes to explore. Ms Page describes this as a "contrivance" and asks the court to insist that the parties focus on the "real issue between them".

26. What are the "real issues" will depend on the individual facts of the case. In attempting to identify the consequences of the earlier cases, to which I have already made reference, I addressed this difficulty in *McKeith v News Group Newspapers Ltd* [2005] EMLR 32 at [17]:

> "For the purpose of defining what the 'real issue' is, one is not confined to that which is pleaded. It is necessary to stand back from the formulation of the case by the parties' counsel and to take a broad and non-technical approach. That would plainly follow from such cases of *Polly Peck* and *Rechem International Ltd v Express Newspapers,* The Times, June 18, 1992… what is or is not 'peripheral' must be judged objectively, on the facts of the individual case, …"

27. In this case it might be possible to tell the jury (following a similar course to that adopted in *US Tobacco* and in *Cruise*) that there had been a dispute about the existence or otherwise of a contract between Mr Warren and Mr Hatton; that there had been litigation; and that it had concluded with Mr Warren's claim being withdrawn and his paying Mr Hatton's costs. Indeed, Ms Page offered such a concession in the course of her submissions. It is questionable whether it is material the jury need to know at all. It is not mentioned in the words complained of (by contrast with the situation in *US Tobacco).* It might, however, become relevant for them to explore why Mr Warren would wish to "do down" Ricky Hatton (as pleaded in the Claimant's meaning), and the contractual dispute could be a relevant factor in determining that question. There is a possible motive. In this context, however, it would be unnecessary for the jury to go into the detail of the quarrel – still less to determine where the merits lay.

28. It will be a matter for the trial judge to decide what, if anything, the jury should be told about the contractual dispute and the associated litigation.

29. I am satisfied that the defamatory sting of which Mr Warren complains in his pleaded meaning is distinct from anything to do with the contractual dispute and whether or not Mr Warren was conducting a public campaign about it. These allegations do not overlap at any point, whether in the words complained of, the Claimant's meaning, or in the particulars of justification. There is no question of having to disentangle them. The two sets of particulars (dealing with the contractual dispute and with Ricky Hatton's earnings, respectively) are separately set out.

30. If the test is whether it would be perverse for a jury to find that the words complained of themselves carry within them the wide-ranging imputations of the *Lucas-Box* meaning, then I would conclude that it has been satisfied.

31. The allegation of lying about Ricky Hatton's earnings is relatively straightforward and inexpensive to resolve. That is the real issue between the parties.

32. Apart from the legal position, it is also necessary to have in mind as a matter of case management that it would be wholly disproportionate and unnecessarily expensive to debate that side-issue. Even those witness statements from the earlier litigation which have so far been disclosed run to over 200 pages and there are, as I understand, 45 pages of pleadings. To permit this costly and time consuming exercise would be wholly contrary to the overriding objective. Since the Defendant wishes to justify the very meaning of which the Claimant complains, I fail to understand why there is a need to go into the other matters. I bear in mind the reasoning of Nicholls LJ in *US Tobacco,* at p.827, and note that, if the Defendant succeeds in proving the lie, that is the end of that part of the claim. If it fails to do so, I do not see that obtaining a jury's verdict on the contractual dispute would overcome the difficulty.

33. I remind myself also that the court must be "astute to prevent misuse of its process": *US Tobacco,* cited above, at p 828 (Nicholls LJ).

34. If it is the case, as I have held, that the material in question is not legitimately to be admitted in support of a plea of justification, then it follows that it may not be admitted purely for the purpose, if it is proved, of mitigating damages either: see *Atkinson v Fitzwalter* [1987] 1WLR 201, 210; *Pamplin v Express Newspapers Plc* [1988] 1WLR 116, 120.

35. The fact that the Claimant's challenge to the inclusion of the contractual dispute comes late in the day is not a reason for *not* excluding irrelevant matters, although it may be a factor to be taken into account in determining questions of costs at a later stage.

36. Accordingly, I would rule out the contract dispute altogether. That will obviously have considerable implications both for the scope of the pleadings and for issues of disclosure. This in no way means, as Mr Browne QC has submitted, that the court will be applying "rough and ready" methods to the determination of the "real issue" between the parties; it will simply have excluded matters which are extraneous to it.