Neutral Citation Number: [2009] EWHC 2735 (QB)

Case No: HQ09X01191

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2009

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

KATE WINSLET **Claimant**

- and -

ASSOCIATED NEWSPAPERS LIMITED **Defendant**

- -
- -

David Sherborne (instructed by **Schillings**) for the **Claimant**
Mark Warby QC (instructed by **Foot Anstey**) for the **Defendant**

Hearing date: 20 October 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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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. The Claimant in these libel proceedings issued an application notice dated 3 September 2009 for permission to read a unilateral statement in open court in accordance with the provisions of CPR 53PD 6.1. This provides that an application to read such a statement may be made "where a party wishes to accept a Part 36 offer or other offer of settlement in relation to a claim for … libel". This Claimant had earlier accepted an offer of amends made in accordance with the regime governed by ss.2-4 of the Defamation Act 1996. The Defendant opposes her present application on the basis that the Claimant is simply not entitled to a statement upon acceptance of an offer of amends. It is argued that she was entitled only to such remedies as she might obtain in accordance with those statutory provisions.

2. The terms in which the offer of amends was accepted are to be found in the solicitors' letter of 4 June 2009:

> "1. The offer of amends is accepted.
>
> 2. The terms have yet to be agreed.
>
> 3. Our client reserves the right to make an application for a statement to be read in open court to vindicate our client if that cannot be agreed."

Thus the Claimant was confirming, as she had made clear throughout, that it was her intention, if the terms of an apology could not be agreed, to apply to the court for a unilateral statement to be read.

3. The background is that the Claimant sued over an article appearing in the *Daily Mail*, spread over pp.28-29 of the issue for 30 January 2009 under the heading "Should Kate Winslet win an Oscar for the world's most irritating actress?" It was also available on the Defendant's website. It is unnecessary to set out the entire article, which was quite lengthy. A few extracts will suffice for present purposes:

> "It was Kate Winslet's normalcy … that made us root for her and queue up to watch her films, that made her performances in her early movies, such as Sense and Sensibility, so believable and touching.
>
> But then she caught a nasty dose of Hollywooditis. …
>
> But Kate? Surely she is more normal than most? Why would she give up that unique appeal, as vital to her success as Angelina Jolie's lips and hips are to hers, and give up that appeal so completely and utterly so that she has become, in my opinion, as drippy and as impossibly vain as the rest of them?
>
> The signs were all there, brewing away, early on. Kate was, compared to most screen performers, curvy and normal looking, albeit with an open, handsome face that, as one female

> editor pointed out, 'is at once good-looking enough to convey great beauty, but relaxed enough for character roles'.
>
> But like many women who dislike how they look, Kate made a big point of mentioning her size, over and over again, as if she were OK with it, which of course she wasn't. …
>
> I have always found that the more a (skinny) actress denies that she ever diets, that she eats like a horse, the reverse is true.
>
> There is no way Kate – despite her protestations the other day that 'As long as all of this is going on, I have stopped exercising and am eating whatever I want. That [exercise] has gone out of the window for now because I haven't got time what with awards ceremonies and film premieres', or that it is her Narciso Rodriguez gowns that nip her in and push her up in all the right places – has not worked supremely, vomit-inducingly hard to get the figure she has today.
>
> I can see the fact she has 'gone for the burn' etched on her woefully drawn features. She might say it is down to 20 minutes of gentle Pilates a day but, trust me, it ain't. I've done that amount of Pilates for years and I do not have anything approaching Ms Winslet's enviable muscle tone.
>
> Of course, I understand her insecurities, which are not her fault. As a sane (reasonably) adult woman I have stood next to these tiny Hollywood stars and wanted to kill myself. But it is this duplicitousness that enrages me and most other women I have spoken to.
>
> Come on Kate, just be honest about how hard it is to be that size – don't pretend that you are still normal.
>
> The number of times Ms Winslet has appeared naked on screen (from early on in her career, in Jude through Hideous Kinky, Little Children and right up to her BAFTA-nominated performance in The Reader) tells me one thing: she is so proud of what she has achieved with her body that she is jolly well going to show it off.
>
> Listen to what she said when she was complimented on her natural breasts by Oprah Winfrey, and her attitude to appearing naked by none other than Halle Berry. 'That is worth all the pain!'
>
> If she were blasé about her body, why would there have been pain? … "

Alongside the article there appeared a number of photographs of the Claimant's naked body, which were taken from films in which she had appeared over the years.

4. The meaning pleaded on the Claimant's behalf was as follows:

> " … that the Claimant had lied publicly about her exercise regime".

5. Following the acceptance of the money offered, on 3 September of this year, the newspaper published an apology which the Claimant and her advisers thought was inadequate. It appeared on p.27 of the issue for 4 September in a rather obscure corner, which bore no relation to the size or prominence of the words complained of. It is about the size of two postage stamps (one inch by two inches) and was in these terms:

> "Kate Winslet
>
> AN article on January 30 compared Miss Winslet's appearance with comments she made about having 'stopped exercising'. We accept that Miss Winslet was not being duplicitous in making her comments or seeking to deliberately mislead about her exercise regime. We apologise for any distress caused."

6. The Claimant now applies to read a statement in open court in these terms (as slightly amended after the hearing before me had taken place):

> "The Claimant is a highly successful Oscar winning actress with a very high public profile in this jurisdiction and throughout the world.
>
> The Defendant is the publisher of the Daily Mail, a newspaper with a daily circulation in the jurisdiction, in excess of 2.2 million and a significantly higher readership.
>
> On 30 January 2009 the Defendant published on page 28 and 29 of the Daily Mail an article entitled *"Should Kate Winslet win an Oscar for the World's most irritating actress?"* which was accompanied by several naked photographs of the Claimant in various films.
>
> The article falsely claimed that the Claimant had publicly lied about her exercise regime.
>
> The Claimant has frequently asserted the right of women to accept the way that they look and by accusing her of trying to mislead the public, the Defendant caused her a great deal of distress. It was simply not true.
>
> The article was also offensive in tone which caused the Claimant further upset and embarrassment, particularly when coupled with the gratuitous photographs.
>
> The Claimant, through her solicitors, wrote to the Defendant and requested an apology. The Defendant refused to apologise so the Claimant issued proceedings for libel in March 2009.

> In the face of those proceedings, the Defendant made an unqualified Offer of Amends, thereby accepting that the allegation was completely false and that it had no defence to the proceedings.
>
> The Defendant published an apology on 4 September accepting that the Claimant had not been duplicitous in making her comments or seeking to deliberately mislead about her exercise regime.
>
> The Defendant has also agreed to pay substantial damages to the Claimant and to pay her legal costs.
>
> In these circumstances and this statement in court having been read out in Court, the Claimant considers that she has been fully vindicated, her reputation has been restored and accordingly is happy to bring these proceedings to a close.
>
> My Lord, it only remains for me to ask for leave that the record be withdrawn."

I am unable to find anything in this draft that is inconsistent with the way she has pleaded or expressed her complaint from the outset.

7. Mr Warby argues that the Claimant has no entitlement to make such an application, despite the broad wording of paragraph 6.1 of the Practice Direction, because the offer of amends regime does not expressly contemplate it. The effect of this would be to be read into paragraph 6.1 an exception, by way of implication, so that it should be understood to mean that an application for a statement may be made where a party wishes to accept an offer of settlement in relation to a claim for libel "unless it is an offer of settlement made under ss.2-4 of the Defamation Act 1996".

8. Several points are raised. First, reliance is placed on s.3(4) of the Act. The section as a whole sets out the provisions which apply where an offer of amends is accepted and includes the following sub-sections:

> " …
>
> (2) The party accepting the offer may not bring or continue proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.
>
> (3) If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed.
>
> (4) If the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the

> offer may take such steps as he thinks appropriate, and may in particular–
>
> (a) make the correction and apology by a statement in open court in terms approved by the court, and
>
> (b) give an undertaking to the court as to the manner of their publication.
>
> (5) If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.
>
> The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.
>
> (6) If the parties do not agree on the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings.
>
> (7) The acceptance of an offer by one person to make amends does not affect any cause of action against another person in respect of the same publication, subject as follows … ”

9. In the light of these provisions, says Mr Warby, only the offeror may make a statement. There are no circumstances in which the offeree should be permitted to do so. It is worth noting, however, that the offeror needs the statutory provisions to be able to make a statement, whereas the offeree would be able (if the Claimant’s submissions are correct) to rely simply on paragraph 6.1 of the Practice Direction.

10. A closely related point is made on the basis of s.3(2). It is said that in applying to make a statement in open court a claimant would be “continuing defamation proceedings” in breach of s.3(2). It is provided expressly that an accepting offeree is entitled to enforce the offer, but only “as follows”; that is to say, no other steps should be permitted than those specifically identified thereafter. In no part of s.3 is any reference made to a statement in open court by the claimant. In these circumstances, it is said that the statute (a) precludes the making of such a statement and (b) should take precedence over the broad wording of the Practice Direction. The premise of Mr Warby’s argument is that by the present application the Claimant is seeking “to enforce the offer”. I do not believe that to be correct for reasons which I shall shortly explain.

11. It is submitted that where, as here, any apology made by a defendant is thought to be inadequate, the only means of reflecting that is by a corresponding increase in the level of compensation assessed by the judge. In this case, that cannot happen as on 3 September the sum of £25,000 was agreed. The Claimant did not wish to argue over quantum, even though she regarded the proposed apology as inadequate. That was

made clear in correspondence, including in the culminating letter of acceptance on that date.

12. Mr Warby argues that it is not a question of discretion: the court simply has no jurisdiction to entertain this application. His client, he says, was entitled after the acceptance letter to publish whatever it chose by way of apology – however inadequate. There could be no sanction because the figure of £25,000 had already been accepted.

13. What the Claimant and her advisers were proposing was a way round the impasse over the wording of an apology. She was saying, in effect, that each side should have the chance to state its point of view. The Defendant would do that through its apology and she through a statement in open court – assuming the court gave permission.

14. In this context, however, Mr Warby points to changes that were made to the Defamation Bill in its passage through the legislature. At one stage, it had been contemplated, in circumstances where the parties could not agree as to the wording of an apology, that the judge might also have a role to play in settling the terms. This was ultimately rejected because of concerns that a defendant might be forced to publish something which was not believed to be true. That is in itself undesirable.

15. It is right to point out that this principle would not be breached merely by a claimant being allowed to publish a unilateral statement in open court, because that would simply represent her point of view. It would be obvious from the very fact of its being unilateral.

16. Against this background, it becomes clear that a central question is whether an application to read a statement in open court, following the Claimant's acceptance of the other terms on 3 September, could be said to represent a "continuation" of the proceedings and thus to fall foul of s.3(2).

17. To take such a step would not be a continuation of the proceedings in any real sense. It may be thought that what Parliament intended to prohibit was the continued prosecution of the action in a substantive way. The question remains, however, whether the application now before the court, made immediately after the acceptance on 3 September, could be said to represent "continuation" in a technical sense.

18. It seems to me that the current exercise is part of bringing the proceedings to a conclusion rather than continuing them. It is perhaps helpful to bear in mind the words of the Court of Appeal in *Barnet v Crozier* [1987] 1 WLR 272, 279-280 *per* Ralph Gibson LJ:

> " … it seems to me that an opportunity to make a statement in open court was thus seen more than 50 years ago as something which was an incident, or part of the available procedure, in a defamation action which the plaintiff was at least entitled to expect to be available to him, provided that the terms of the statement were approved by the judge and there was nothing in the case which made it unfair to another party to the statement to be made.

> The present rule, RSC, Ord 82, r.5, which derives from the previous RSC, Ord 22, r.2 introduced in 1933, provides for the making of a statement in open court with the leave of the judge, both when there has been acceptance of money paid in and when the action is settled before trial without a payment into court.
>
> The judge was right, in my view, to regard the settlement of proceedings as a public good which the court should encourage and facilitate if, having regard to the interests of all the parties, it is right and just so to do. Although a party has no right to make a statement in open court upon which he can insist if the circumstances are such that the judge cannot in his discretion approve that course, it seems to me that parties who have made a bona fide settlement of a defamation action and ask leave to make a statement in open court may expect to be allowed to do so unless some sufficient reason appears on the material before the judge why leave should be refused to them. By saying that he did not regard either party as having a burden of proof, while acknowledging that it is desirable for settlement to be facilitated, I think the judge meant, as he said, that he must have regard to the interests of all parties; but, if there is no sufficient reason to refuse it, a plaintiff who has reached a settlement with a defendant should be allowed to make an approved statement. I think the judge was right in his approach."

Of course, the reference to the former Rules of the Supreme Court is now out of date, but I have already pointed out that the current rule is very broad in its terms and is intended to provide for the possibility of a statement in open court following *any* form of settlement in libel proceedings. It is equally clear that the public policy of encouraging and facilitating the settlement of proceedings is at least as important today as it was in 1986.

19. The use of a statement in open court has long been seen as part of the settlement process or as an "incident" of it, as Ralph Gibson LJ made clear. He made the same point at p.281:

> "Finally for the reasons already given, the opportunity to make a statement in open court is an incident of the court's procedure which parties who settle such an action can be expected to be allowed to use unless there is some sufficient reason to cause the court to refuse to approve that course."

It would be quite artificial to regard it as a continuation of the proceedings, in those circumstances, since continuation is the antithesis of settlement.

20. In my judgment the jurisdiction exists. There is no good reason to make an exception to the broad wording of paragraph 6.1 of the Practice Direction. Indeed, counsel checked the position and confirmed that the Practice Direction came into effect on the very same day as the offer of amends regime (28 February 2000). It is thus clear that

the two sets of provisions were intended to operate in harness. The draftsman of the rule would clearly be aware of the offer of amends option and, if it was intended to exclude settlements of that kind, express wording would surely have been inserted. It is difficult to imagine, however, what consideration of public policy would require such a step to be taken.

21. It is important to recognise, having regard to the underlying purpose of the offer of amends regime (i.e. to encourage settlement and constructive negotiations between the parties), and the explanation of the function of statements in open court given by the Court of Appeal in *Barnet v Crozier*, that what the Claimant is seeking to do is not "to enforce the offer" under the statutory provisions, as Mr Warby suggests, but rather to take a separate and independent step which has long been recognised as an incident to the settlement of libel proceedings generally – not linked specifically to the new statutory regime.

22. Mr Sherborne points to an irony, as he would submit, in that on 3 August the Defendant was indicating that it wished to refer to its offer, by way of analogy with one made under Part 36, in the context of costs. Yet, at the same time, the analogy was not permitted to work in the Claimant's favour and enable her to make a statement in open court. I am not sure, however, that this point is of great assistance in the context of what is essentially a matter of construing the statute and the Practice Direction in a constructive and purposive manner.

23. It is acknowledged that the defamatory allegations were false. That is part and parcel of making the offer of amends. There is accordingly nothing unfair to the Defendant in permitting the statement to be made. In the absence of any agreed wording, the Defendant chose to put its own "spin" on the settlement in publishing its apology in the rather dismissive way I have described, thereby according to it the significance it thought appropriate. I see no reason why the Claimant should not also be allowed to publicise her understanding of the settlement, provided she does so in a fair and proportionate way. Nor, in terms of the bargain reached between the parties, is there anything inconsistent or unfair in the stance the Claimant is now taking. She made it clear throughout that she would, if necessary, seek permission for a statement in open court to be read. She is not seeking to gain an additional advantage behind the Defendant's back.

24. In the circumstances, I have come to the conclusion that the court has the power to order a statement in open court in the context of a settlement under the offer of amends regime. Furthermore, on the facts of this case, I see no injustice to the Defendant in permitting the Claimant to make the statement which I have quoted above in an attempt to draw the Defendant's apology to the attention of rather more of the original readers of the article than would be achieved by the modest announcement made in the *Daily Mail*.