Neutral Citation Number: [2013] EWHC 3355 (QB)

Case No: HQ13D02853

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2013

Before :

THE HONOURABLE MR JUSTICE DINGEMANS

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Between :

Richard Rufus (in bankruptcy)	**Claimant**
- and -	
Paul Elliott	**Defendant**

- -
- -

Jonathan Barnes (instructed by **Simon Smith, Solicitor**) for the **Claimant**
David Price QC (of **David Price Solicitors and Advocates**) for the **Defendant**

Hearing date: 23 October 2013

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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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MR JUSTICE DINGEMANS

Mr Justice Dingemans :

Introduction

1. This is a libel claim brought by Richard Rufus, a former professional footballer who now assists in community work through the Charlton Athletic Community Trust, in respect of a press release issued by Paul Elliott. Mr Elliott is also a former professional footballer, and he has had a long involvement with anti-racism initiatives in football and has been appointed a CBE for services to equality and diversity in football. Mr Elliott is a former trustee of "Kick It Out", an anti-racism campaign group supported by the Football Association ("FA").

2. Mr Rufus and Mr Elliott have, in the past, been friends and business colleagues. Mr Rufus claims that the press release issued by Mr Elliott was defamatory of Mr Rufus because, in the context of a previous article published in the Sun newspaper on 18 February 2013, it meant that Mr Rufus had made public a private SMS text message, in which Mr Elliott had used an extremely offensive word. This was an allegation of disloyalty and dishonourable conduct. It might be noted that Mr Rufus says that it was not him that made public the text message, but this is nothing to the legal issue before me.

3. Mr Elliott claims that the word that he used to Mr Rufus was so offensive that it cannot be defamatory to say that Mr Rufus made it public. Right-minded thinking members of society would commend Mr Rufus for his public spirited actions in exposing the wrongful use of the extremely offensive word, even if it had been sent in a private text message to a former friend. As appears below, it might be noted, as Mr Price QC on behalf of Mr Elliott has pointed out, the question is not whether Mr Rufus would be commended, but only whether the publication would tend to lower Mr Rufus in the estimation of right-thinking members of society generally.

4. Mr Rufus accepts that the word was offensive and, so Mr Barnes on behalf of Mr Rufus submitted, "toxic". Mr Rufus notes that it was Mr Elliott who used it to Mr Rufus. Mr Rufus says that Mr Elliott has added public odium and contempt to the original insult of using the word, by falsely accusing Mr Rufus of betraying a former friend by making public the private communication.

5. It is in these circumstances that Mr Elliott brings an application seeking: (a) a determination that the statement pleaded in paragraph 8 of the Particulars of Claim is not capable of being defamatory of Mr Rufus or bearing certain specified meanings; and (b) that the claim be struck out.

6. I should note that this is an application about whether the words are capable of bearing a defamatory meaning. It is not the hearing of a preliminary issue for a determination as to the actual meanings of the words. This is because the actual meanings will be a matter for trial, which may (depending on directions), be a jury trial.

The context

7. On 18 February 2013 Mr Elliott and Mr Rufus were the subject of an exclusive article in the Sun newspaper. The material parts of the article are set out in paragraph 5 of

the Particulars of Claim. The article was headlined "*A football anti-racism champion has sparked a race row after calling another black man "n*****"*". The article noted that Mr Elliott had written Mr Rufus a text message about a business venture which had gone wrong. The text had said "*Ur a stupid man n***** ... You dog, Ur history my friend*".

8. The article noted that it was understood that Mr Elliott had insisted that the term was not offensive because of the nature of the conversation and because it was between two black men. It was noted that the row was likely to embarrass the FA.

9. It is common ground that the use of the word is extremely offensive and wrong.

The press release

10. On 23 February 2013 Mr Elliott resigned as a trustee of the "Kick it Out" campaign. He issued a press release. The press release was headed "*Paul Elliott CBE resigns as Kick It Out Trustee*". It continued that Mr Elliott "*has released the following statement to clarify this decision: Earlier this week, a former friend and business colleague, made public a SMS text message I sent him, in which I used a term which is widely known as being derogatory to my community*". The press release continued acknowledging that the use of the term was inappropriate and that use of the word sent out mixed messages and contradicted his position as a Kick It Out trustee.

The pleaded meaning

11. The Particulars of Claim plead at paragraph 9 that, by way of innuendo, the press release meant that Mr Rufus "*had acted dishonourably and betrayed the Defendant and deliberately harmed his reputation by making public a private SMS Text communication sent by the Defendant to the Claimant which was inappropriate ... and which contradicted the Defendant's role as a Kick It Out trustee, causing his resignation from it*".

12. The Particulars of Claim pleaded the way in which the press release had been reported and picked up online comments about the articles.

Applicable legal principles

13. The principles to be applied on applications of this nature are well-established. They were summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at [14]:

> "*The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the*

> *publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation ...' .... (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.'"*

14. There are a number of well-known definitions of the legal meaning of the word "*defamatory*". Sir Thomas Bingham MR in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 said:

> "*A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.*"

15. It follows that it is not enough that the words should damage the Claimant in the eyes of a section of the public only, see *Modi v Clarke* [2011] EWCA Civ 937. Moreover, it is not in dispute that to be counted as defamatory an allegation must pass a certain threshold of seriousness: *Thornton v Telegraph Media* [2010] EWHC; 1414 (QB); [2010] EMLR 25 at paragraph 16. As Lord Atkin expressed it in *Sim v Stretch* [1936] TLR 669 at 672; [1936] 2 All ER 1237 at 1242:

> "*That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs.*"

Right-thinking members of society and the informer cases

16. There have been a number of cases where the Courts have had to consider whether a "right-thinking member of society" would think any less of a person who reports wrongdoing, or acts as an informer.

17. It has been noted that "*an informer is by no means a popular character*". Mr Barnes put it more colloquially, saying "*no one likes a snitch*". It is true that it can be galling to be wrongly called an informer or snitch, but that is a different matter from whether the right-thinking member of society would think any less of the alleged informer, and whether the law of libel would provide a remedy.

18. In *Graham v Roy* (1851) 13 D. 634, the Court of Session in Scotland held that a report that a person had given information to the officers of Excise against a distiller, and assumed the office of common informer in order to obtain half of the penalties

awarded, was a ground for a claim. Lord Fullerton dealt with the argument that it could hardly be defamatory to say that a person had given information which had the effect of repressing an illegal act such as smuggling by saying "*it may be perfectly legitimate to give information, but an informer is by no means a popular character*".

19. In *Mawe v Pigott* (1869) Ir.R. 4 C.L. 54 a claim for libel was brought by an Irish priest, who was said to be an informer against disloyal and criminal classes. The action was dismissed. The argument on behalf of the priest was noted to be that amongst certain classes who were either themselves criminal, or who sympathised with crime, it would expose the priest to great odium to represent him as an informer or prosecutor. Lawson J, giving the judgment of the Court, said "*that is quite true, but we cannot be called upon to adopt that standard*".

20. *Myroft v Sleight* (1921) 90 LJKB 883 was an action for slander. Both Plaintiff and Defendant were skippers of trawlers in Grimsby, and were members of a trade union. The Defendant was on the committee. There were issues about remuneration and a vote was taken on strike action. The Plaintiff voted for the strike, and the Defendant against it. The strike failed. The Defendant said at a subsequent meeting that during the strike the Plaintiff had attempted to secure a ship to go to sea. There were two issues: first whether the words were defamatory; and second whether the words related to the Plaintiff's work. It was held that the words were defamatory, but as they did not relate to the Plaintiff's work, they were not actionable in absence of proof of special damage. It is the first finding that is relevant to this case.

21. McCardie J. noted that the Plaintiff was "*entitled to earn his living and to pursue his calling as a skipper*" and that attempting to hire a boat was lawful and might be considered laudable. However he noted that "*a charge of trickery or of underhand disloyalty or of hypocrisy is a very different matter*". McCardie J. considered that the words were defamatory noting that they had been spoken of a person who had voted for the strike recording that the Defendant meant to charge the Plaintiff "*with conduct which I think would be condemned by a just, fair-minded and reasonable citizen*".

22. In *Byrne v Deane* [1937] 1 KB 818 the Court of Appeal held that it was not defamatory to allege, in the form of a short rhyme posted in the location of the removed machine, that a member of a club had given information to the police about illegal gaming machines in the club. The argument of the Plaintiff before the Court of Appeal was that "*the sting of the libel ... is that the plaintiff has been disloyal to the fellow members of his club*" (page 825).

23. Slesser LJ, who was in the majority with Greene LJ, said "*to say or to allege of a man ... that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him in the minds of the general public*". This was from the point of view of "*what a good and worthy subject of the King would think of some person*". Greene LJ refined the meaning of the rhyme to be "*that he was guilty of disloyalty by reporting the matter to the police*". Greene LJ noted that it could not be considered defamatory to say that he had reported the matter to the police and continued "*if the allegation that he reported the matter to the police is not defamatory, in my judgment the allegation that in reporting the matter to the police he was guilty of disloyalty cannot be defamatory*". Greene LJ rejected the notion that there could be degrees of criminal behaviour, and that illegal gaming machines should be considered less worthy of official report.

24. Greer LJ, dissenting, considered that the statement in the document was "*that the Plaintiff who gave the game away was guilty of disloyalty to his fellow members of the Club*".

25. The approach of the majority in *Byrne v Deane* was followed in *Williams v MGN Limited* [2009] EWHC 3150 (QB). In that case a person, who had been convicted of murder, complained that an article defamed him by calling him a "grass" or police informer. That had obviously made life in prison very much more difficult for the Claimant, but it did not give rise to a claim for defamation. (It should be noted that a Claimant in such a position might still be able to bring an action for malicious falsehood, as occurred in *Thornton,* if the words were false and published maliciously, for example to cause problems for the Claimant in prison).

26. It does not seem to me that the decision in *Graham v Roy* can be reconciled with the judgment of the majority of the Court of Appeal in *Byrne v Deane*, which is binding on me. It may be that the proper explanation of the decision in *Graham v Roy* is that it is more of a reflection of the status of the Exciseman at that particular time in history.

27. The right-thinking members of society have been described as "*ordinary good and worthy subjects*" of the Crown, and they appear to share the characteristics of the hypothetical "*reasonable man*", see *Myroft v Sleight* (1921) 90 LJKB 883 at 886, or persons found travelling on buses in south London.

28. In my judgment the "*informer*" authorities establish the following propositions: (1) it cannot be defamatory to say of a person that he is acting disloyally in reporting a crime to relevant authorities, even if that statement exposes the person to odium or contempt from a section of society, such as criminals, see *Mawe v Pigott* and *Byrne v Deane*; (2) unless the person is reporting a crime, it may be defamatory to say of a person that they have acted disloyally, even if the person was acting lawfully in carrying out the disloyal activity, see *Myroft v Sleight.*

The press release is capable of bearing a defamatory meaning

29. In the end there was not much serious dispute about the potential meaning of the press release in the context of the Sun article, because it was accepted that the clear meaning was that Mr Rufus had made public the text message.

30. That then leaves the issue of whether the meaning set out in paragraph 29 above can be defamatory, and whether right-thinking members of society would consider Mr Elliott's use of the word so wrong that they would not think any the less of Mr Rufus for having made it public.

31. In my judgment right-thinking members of society are well aware: (a) of the ordinary weaknesses and failings of mankind; (b) that in private communications between former friends, even the most well-intentioned and hard-working people (such as Mr Elliott), might say things which should never be said. In these circumstances right-thinking members of society could, in my judgment, take the view that sending a private communication to the public, with the inevitable consequence that the former friend would lose his office, was both disloyal and wrong.

32. Therefore right-thinking members of society might conclude that the press release was, in its context, defamatory. This would be because in their judgment it meant that Mr Rufus had acted disloyally to his former friend by making public his private text message, in which Mr Elliott had used an extremely offensive and wrong word. This was in circumstances where Mr Rufus was not reporting the text to any relevant authorities, but to the public.

33. Although the pleaded meaning in the Particulars of Claim might be considered somewhat elaborate (and it is only fair to point out that Mr Barnes was not responsible for the pleading), I reject the Defendant's submission that the words betrayal or dishonour have been tacked on to create a defamatory meaning, as the words are capable of meaning that Mr Rufus acted disloyally. I also reject the submission that the pleaded word "private" before the text adds nothing. The press release referred to making the text "public", and, as appears above, right-thinking members of society might consider that the words meant that Mr Rufus had acted disloyally to his former friend by making public his private text message, in which Mr Elliott had used an extremely offensive and wrong word. I do not consider that this is the most serious of libels, but the words are capable of being defamatory.

34. I should record that in ascertaining the meaning, and in assessing whether the meaning is capable of being defamatory, I have taken no account of what Mr Elliott himself appeared to have intended to say by issuing the press release, and have not taken account of the online comments reported in the Particulars of Claim.

Claimant's bankruptcy

35. After the conclusion of the hearing and after the draft judgment had been circulated to the parties, I was informed that the Claimant has been made bankrupt on 22 October 2013. It appears that the cause of action for libel does not vest in the trustee in bankruptcy, see Gatley on Libel and Slander, Eleventh Edition, at paragraph 8.7, and the fact of bankruptcy does not alter the judgment on whether the words are capable of bearing a defamatory meaning. The bankruptcy may raise other issues between the parties.

Conclusion

36. For these reasons I find that the statement is capable of having the meaning attributed to it in the Particulars of Claim, and that the statement is capable of being defamatory of the Claimant.

37. I am very grateful to both Mr Price and Mr Barnes for their helpful submissions.