Neutral Citation Number: [2014] EWHC 814 (QB)

Case No: HQ14D00139

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2014

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

JAMES WHITE	**Claimant**
-and-	
EXPRESS NEWSPAPERS	**Defendant**

And between:

JOHN CALLAGHAN	**Claimant**
-and-	
EXPRESS NEWSPAPERS	**Defendant**

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Robert Sterling (instructed by **Caruthers Law**) for the **Claimants**
Christina Michalos (instructed by **Express Newspapers**) for the **Defendant**

Hearing date: 18 March 2014

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Judgment

Mr Justice Tugendhat :

1. On 18 March 2014 I handed down my judgment in this libel action [2014] EWHC 657 (QB) ("the Judgment"). Following that there was a hearing in relation to costs. The Defendant asks for an order that the claimants pay two thirds of the Defendant's costs of the proceedings arising from its application notices dated 19 November 2013. In the alternative it asks that there be no order as to cost. The Claimants each submit that the costs of the application should be in the case.

2. As recorded in the Judgment, the application notices dated 19 November 2013 were in each case made pursuant to Part 53 Practice Direction 4.1(1). The ruling sought was that, in the case of each Claimant, the words complained of were not capable of bearing the meaning attributed to the words complained of by the Claimant. However, as explained in paragraph 5 of the Judgment, I did not make a ruling on those applications. Instead I invited the parties to consider whether they wished to agree, and in due course they did agree, that the hearing should be treated as the trial of a preliminary issue in the action. The difference is that on the trial of a preliminary

issue the court decides what the words complained of actually mean, and does not simply delimit the range of possible meanings.

3. The first point relied on by Ms Michalos in support of her contention is that the Defendant's applications were successful because it was held that the words complained of do not bear the meaning pleaded namely that each of the Claimants was guilty. She referred to paragraph 16 of the Judgment in which I held that the words complained of "clearly fell short of alleging actual dishonesty or other wrongdoing". She submits that amounts to a finding that the words complained of were not capable of bearing those meanings.

4. Next Ms Michalos submitted that an order for costs in the case would be very harsh on the Defendant. She submits that there is the risk that the result would be that the Defendant pay the full costs of the Claimants as well as its own costs. That would be unjust because the Claimants each exaggerated their claims by attributing to the words complained of a meaning more serious than that which I have found the words complained of to bear. She referred to the White Book (2014 edition) para 44.3.1.2, p1313. Further, submits Ms Michalos, to plead a libel case too high is an interference with the right of the Defendant to freedom of expression for reasons explained in the judgment I gave in *John v. Guardian* [2008] EWHC 3066 (QB) at paras 16 to 17.

5. Ms Michalos further submitted that an order of costs in the case would discourage the Defendant from co-operating with claimants in the future in the event that a trial of a preliminary issue on meaning may be proposed either by the parties or by the court.

6. Mr Sterling notes that on an application under the Practice Direction the court is required by sub paragraph (3) to decide whether the statement is capable of bearing any other meaning defamatory of the claimant, that is to say other than a meaning attributed to it by a claimant. Accordingly, in her argument on 19 February 2013, Ms Michalos had submitted in relation to Mr Callaghan:

> "… that this case really calls for a new Chase level 4 – in other words a level below a clear case of 'grounds to investigate'. Insofar as the meaning in respect of Callaghan is thought to be classified with conventional Chase levels, it is submitted that this is Chase level 3 at the very lower end…".

And in respect of Mr White Ms Michalos submitted that:

> "It is possible that an unreasonable reader may infer something to the discredit of Mr White; but a reasonable reader would conclude that it is too early to say".

7. In her written submissions for the hearing on 19 February Ms Michalos had accepted (for the purposes of her application under the Practice Direction) that the words complained of were capable of meaning something defamatory about Mr White, albeit that she submitted that the meaning could be no higher in respect of Mr White than in respect of Mr Callaghan. And she submitted that, in any event, and the actual meaning was not defamatory of Mr White.

8. Mr Sterling submitted that my finding that the meaning was at Chase level 2 as explained in paragraphs 9 and 21 of the Judgment, therefore represents a measure of success for the Claimants. The Claimants have lost on their high meaning (Chase Level 1). But the Defendant has lost on the submission that the article was not defamatory of Mr White, and was at, alternatively below, Chase Level 3 for Mr Callaghan.

9. Mr Sterling submits that on the trial of a preliminary issue the court may defer the issue of costs until the conclusion of the case as a whole. He referred to the White Book (2014) para 44.3.1.2.

DISCUSSION

10. I reject Ms Michalos's submission the Defendant's applications were successful. I did not have to, and I did not, make a ruling that the words complained of were not capable of bearing the meaning attributed to them by each of the Claimants. I did not foresee that that issue needed to be decided. If it does need to be decided, then it is solely in support of an application for costs. But the court does not normally decide issues of substance solely for the purpose of determining what is the appropriate order for costs. I decline to do so in this case. I have not been asked to re-open and I do not re-open the decisions made that the hearing should proceed as a trial of preliminary issue, and not as an application under the Practice Direction.

11. Accordingly I shall approach the issue of costs as I would have done if the hearing had been ordered to be a trial of a preliminary issue from the start.

12. As is well known, applications in accordance with the practice direction para 4.1 suffer from disadvantages. The reason the Practice Direction is in the form that it is results from the fact that that, until the coming into force of the Defamation Act 2013, each party has a right to trial by jury under the Senior Courts Act 1981 s.69. Since the actual meaning of words complained of is an issue for the jury, the Judge cannot decide the actual meaning as a preliminary issue. Therefore issues of meaning (to be determined according to different criteria) might have to be decided twice in the same action, first by the Judge (whether the words complained of were capable of bearing a meaning) and by the jury thereafter (what meaning they actually bore). A defendant could succeed at trial having failed on the application pursuant to the Practice Direction.

13. It seems to me that the trial of a preliminary issue therefore carries benefits to a Defendant who has issued (or might be considering whether to issue) an application notice under the Practice Direction. The burden the Defendant has to discharge is a lower one on the trial of a preliminary issue. And if there is the trial of a preliminary issue there need be only one hearing on the question of meaning, instead of two.

14. But the trial of a preliminary issue also carries benefits for a claimant. It is not in the interests of either party to have two hearings when one will suffice. And if a claimant succeeds in resisting an application under the Practice Direction, but then fails at trial, his victory will have been a Pyrrhic one, and he may face an additional burden of costs.

15. Accordingly in my judgment there were benefits to both parties to agree, as they did, to the matter proceeding by way of a trial of a preliminary issue. Neither party sought to make their agreement to the hearing being treated as a trial of a preliminary issue subject to any condition as to costs, and they were right not to do so.

16. I accept Ms Michalos's submission that there is a general public interest in parties being discouraged from exaggerating their claims, and that such discouragement may be in the form of a costs order. I also accept that there are particular reasons for discouraging exaggerated claims for libel, for the reasons given in *John v Guardian*. It would be unjust if a defendant were to fight the case and lose (and I intend no suggestion that I have formed a view on what will happen in this case), that the defendant should have to pay all the costs of a preliminary issue in which that defendant had succeeded in obtaining a ruling that the claimant had exaggerated the claim by overstating the seriousness of the meaning the claimant attributed to the words complained of.

17. In some cases it may be that an order for costs in the case might be the right order. But in the two cases now before me that would not reflect the fact that the Claimants have each exaggerated their claims. But both Claimants have achieved something by the Judgment that I made. I conclude that given the outcome of the two cases before me, the right order in respect of both of them is no order for costs.

18. That leaves the question who should pay for the costs of the dispute as to what order should be made in relation to the costs of establishing the form of the order following the Judgment.

19. In an open letter dated Monday 17 March 2014 the Defendant's solicitor made an offer to agree that there be no order for costs. Accordingly, as from the time of that offer, the order for costs in respect of the form of the order will be that the Claimants pay to the Defendant the Defendant's costs. For the period between the handing down of my Judgment and the open offer, there will be no order for costs.