Case No: HQ13D05888

Neutral Citation Number: [2014] EWHC 1170 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2014

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Joanne Kathleen Murray	**Claimant**
- and -	
Associated Newspapers Ltd	**Defendant**

- -
- -

Schillings for the **Claimant**
RPC for the **Defendant**

There was no oral hearing: the matter was decided on paper

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Judgment

Mr Justice Tugendhat :

1. On 1 April 2014 the Claimant in these libel proceedings issued an application notice applying for permission to read a unilateral statement in open court in accordance with the provisions of CPR 53PD para 6.1. This provides that an application to read such a statement may be made "where a party wishes to accept a[n] … offer of settlement in relation to a claim for … libel". The application is made following the acceptance by the Claimant of an offer of amends made by the Defendant pursuant to the Defamation Act 1996 ss.2-4. The Claimant asks the Court to deal with her application on paper (CPR r.23.8). She has submitted a witness statement made by Mr Hobbs, her solicitor, on 1 April 2014. The exhibits include correspondence from the Defendant. In addition to the letters in that exhibit, there is a letter dated 9 April in which the Defendant asks the court for an oral hearing, and for directions to be given pursuant to CPR 23A PD paras 2.4 and 2.6 for the filing of evidence and submissions.

2. I have decided to deal with the matter on paper, but to set out my reasons in a public judgment. I give permission to the Claimant to read the unilateral statement in open court in the form submitted with her application notice.

THE LAW

3. The Defamation Act of 1996 ss.2-4 provide for the making of offers of amends. By s.3 it provides for what is to happen when a party accepts an offer of amends (usually a claimant). This includes:

> "(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 … "

4. The Act does not say what a claimant is entitled to do where the parties have not agreed. But the CPR Practice Direction 53 para 6 does, as Eady J held in *Winslet v ANL* [2009] EWHC 2735 (QB), [2010] EMLR 11. He held that the claimant is entitled to make the application which the Claimant has made, that is for permission to read a unilateral statement in open court.

5. There are cases in which a defendant has been permitted to make oral representations in opposition to a claimant's application for permission to read a unilateral statement in open court. *Winslet* was such a case. But *Winslet* was an exceptional case, since the main issue in dispute between the parties in that case was whether the court had jurisdiction to entertain an application by a claimant who had accepted an offer of amends under the 1996 Act for permission to make any statement at all (he held that the court had jurisdiction). By contrast, there is no precedent of which I am aware of a claimant applying to the court to seek to enforce her wishes as to what a defendant should do pursuant to s.3(4). And s.3(2) appears to present an obstacle to any such application.

6. Other cases where there have been oral hearings as to the contents of a unilateral statement have been under the law as it was before 1996, and so in relation to settlement otherwise than by offer of amends: see Gatley on Libel and Slander 12th ed para 29.10. In *Barnet v Crozier* [1987] 1 WLR 272 Ralph Gibson LJ said at pp 278-9 and 281 :

> " … 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…. 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."

7. In *Winslet* Eady J cited these passages and added :

"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 [a reference to what is prohibited by s.3(2)], 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….

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*."

THE ACTION

8. On 21 October 2013 the Claimant complained by letter of words published by the Defendant in hard copy in the *Daily Mail* and on online in *MailOnline* on and after 27 September 2013. The titles were similar. In the online copy it was "How JK Rowling's sob story about her past as a single mother has left the churchgoers who cared for her upset and bewildered".

9. Attempts to resolve the dispute by letter were unsuccessful. The Claimant proposed an early determination of the issue of meaning by a retired High Court Judge. On 4 December the Defendant dismissed this proposal on the grounds that: "The fact that the article is not capable of bearing the meaning you put forward, or any defamatory meaning, means that it falls at the first hurdle".

10. The Claimant issued her claim form on 10 December 2013 with Particulars of Claim dated 18 December. The meaning which she attributes to the words complained of is a natural and ordinary meaning as follows:

> "the Claimant had given a knowingly false account of her time as a single mother in Edinburgh in which she had falsely and inexcusably accused her fellow churchgoers of behaving in a bigoted, unchristian manner towards her, of stigmatising her and cruelly taunting her for being a single mother".

11. On 8 January 2014 she issued an application notice applying for a determination of the issue of the meaning of the words complained of. On 21 January 2014, on the last day of an extension of time for service of a Defence, the Defendant made its unqualified offer of amends in accordance with the Defamation Act 1996 ss.2-4. It was an offer to:

> "1. make a suitable correction of the words complained of and a sufficient apology…

> 2 publish the correction and apology in a manner that is reasonable and practicable in the circumstances; and
>
> 3. pay [the Claimant] such compensation (if any), and such costs as may be agreed or, if they cannot be agreed, as determined to be payable by the court".

12. On 22 January the Claimant accepted the offer of amends. In doing so she put forward proposals for the purpose of reaching an agreement as is envisaged by s.3 of the 1996 Act. The letter goes on:

> "Your letter states that your client will dispute the facts and matters contained in paragraph 6 of the [the] Particulars of Claim [ie matters relied on in aggravation of damages]. If this matter cannot be agreed between the parties and proceeds to a compensation hearing, [the Claimant] will seek directions that evidence be filed and served with a statement of truth signed by the journalist involved, setting out exactly what in paragraph 6 is accepted, what is rejected and what his version of events is. We will then seek disclosure of all relevant documents. You will understand that there are many issues aggravating compensation which we may wish to pursue in any compensation hearing. We have avoided doing so at this stage in a spirit of compromise, but it should not be assumed that they will not be pursued…
>
> Whilst accepting your Offer of Amends, we continue to reserve our client's right to apply for the reading of a Statement in Open Court…"

13. The parties have not agreed what is to be done. It follows that the Defendant is entitled, by s.3(4), to take such steps as it thinks appropriate.

14. On 26 March 2014 the Claimant put forward a revised draft of a unilateral Statement in Open Court with a view to allaying any objections the Defendant might raise to it being read. On 28 March solicitors for the Defendant raised objection to a number of passages in that draft. In a letter dated 1 April solicitors for the Defendant put forward further detailed submissions to the Claimant. It submits that it would be unfair for the Claimant to include in her Statement any matters which are pleaded in aggravation of damages.

15. In its letter of 9 April solicitors for the Defendant state that its application to make oral submissions in opposition to the Claimant's application is "the normal way". It submits that "this case raises important issues concerning the use (and misuse) of unilateral statements in open court".

DISCUSSION

16. In my judgment it follows from the terms of s.3 of the 1996 Act that the court should not regard as normal an oral hearing of submissions by a defendant that a claimant should be refused permission to make a unilateral statement. That would in effect be

likely to involve further submissions by a claimant, which would come close to the continuation of proceedings which is prohibited by s.3(2). It would also make the procedure envisaged by s.3 unfair to a claimant. A defendant is free to put whatever it wants in any publication made pursuant to s.3(4): the court should be slow to permit a defendant to seek to control what a claimant wishes to say for her part in her unilateral statement.

17. I respectfully agree with Eady J that the guidance in *Barnet v Crozier* remains applicable today. But as with any decision of the courts relating to defamation which was made before the Human Rights Act 1998, it is useful to look again at the reasoning in the light of the right of freedom of expression provided in Art 10 of the Convention. It seems to me that what a claimant is to be permitted to say in her Statement in Open Court engages her right to freedom of expression. If so, the court must have regard to that, while, of course, also having regard to the rights of others, including the rights of a defendant. I see nothing in the law of freedom of expression as it is now understood that could be said to cast doubt on what was said in *Barnet v Crozier*.

18. In my judgment the jurisdiction to refuse permission should be used only where there is "sufficient reason", and the determination of what is or is not a sufficient reason should not require the court to determine what would have been issues in the action if it had not been settled. That would tend to defeat the purpose of reaching a settlement, which it was the legislative purpose to encourage.

19. In the present case, one of the grounds of objection raised by the Defendant in the letter dated 28 March 2014 relates to whether the proposed statement is consistent with the meaning which the claimant attributed to the words complained of. On the facts of this case determination of that issue would involve the court enquiring into the meaning of the words complained of, which is an issue which is settled by the making of an unqualified offer of amends.

20. In that letter the Defendant's solicitors object that by accepting the Defendant's offer of amends the Claimant accepted an offer only to correct and apologise for the specific meaning pleaded in the Particulars of Claim.

21. That submission misses the point. The claimant is not applying for permission relating to any correction and apology: it is for the Defendant to publish an agreed correction and apology, or, in the absence of agreement, to "take such steps as [it] thinks appropriate".

22. The Claimant's pleading in aggravation of damages included those set out in "the correspondence between her advisers and the Defendant". A number of these are the subject of the passages in the draft Statement to which the Defendant objects on the grounds that they are not referred to in the meaning attributed to the words complained of.

23. In my judgment a defendant would be entitled to include in its correction and apology matters which, if they were included, would be relevant to the assessment of damages under s.3(5) if, as is the case here, the parties have not agreed upon damages. I see no reason why the Claimant should not be permitted to include such matters in her unilateral Statement. If the parties do not agree on damages s.3(5) provides for the

court to determine the amount. The Court in assessing any damages under s.3(5) will take into account not only what the Defendant has published, but also what the Claimant has stated in open court. They will be matters which the Defendant will be entitled to rely on in mitigation of damages, since s.3(5) provides that the court must apply "the same principles as damages in defamation proceedings". Moreover, it would not be consistent with the legislative purpose for there normally to be a hearing on what the claimant is to be permitted to say in her unilateral statement, in addition to a hearing for the determination of damages. Such hearings should be exceptional if the overriding objective is to be achieved.

24. Having carefully considered the correspondence from both sides, I have concluded that there is no sufficient reason for refusing permission to the Claimant to read the unilateral Statement in Open Court in the form of the draft submitted with her application notice.

25. I have also concluded that the overriding objective requires that I decide this matter on paper. The resolution of the Claimant's complaint, which was eventually admitted to be well founded, has taken far too long already. Those representing the Defendant are highly experienced in this field of the law, as is the Defendant itself. It has not given any indication of what further submission it might wish to make in addition to the numerous matters already canvassed by it in its lengthy and carefully argued letters. I see no purpose in giving any further directions or permitting any further argument, and every reason for avoiding any further delays.

POST SCRIPT

26. Following the circulation of this judgment in draft the Defendant asked whether it would be acceptable for submissions in writing by Mr Caldecott QC to be put before me. These were referred to as the submissions that would have been advanced if I had given directions for the making of submissions, which I decided not to do. I read those submissions.

27. I am grateful to Mr Caldecott for drawing attention to *Abu v MGN Ltd (Practice Note)* [2002] EWHC 2345 (QB); [2003] 1 WLR 2201, in particular paras [8] and [9]. In that case Eady J explained the background and legislative purpose of the 1996 Act provisions for offers of amends. The issue in that case was the assessment of compensation under s.3(5), and no mention was made of a unilateral statement in open court. It may well be that some of the observations in the judgment may be relevant when the court is considering an objection to the form of a proposed unilateral statement. Mr Caldecott refers to the observation of Eady J that "the offer of amends is construed as relating to the complaint as notified". He submits that the draft unilateral statement in the present case includes matters outside the scope of the complaint as notified. The points he refers to are all matters which were raised in the correspondence exhibited to the Claimant's application and witness statement, and which I considered when I made my decision. Mr Caldecott submits that, in particular, the draft statement includes matters not pleaded, but which as (he submits) the Claimant would have had to plead in order to comply with CPR r16.4(1)(c) and PD 53 para 2.10(1)) (both provisions relate to grounds relied on to claim aggravated damages). However, in a claim for damages for libel made by an individual, the claimant is entitled to compensatory damages for injury to feelings, including injury to feelings caused by the conduct of the defendant after the libel was published. It is

difficult to draw a clear line between what can be claimed as compensatory damages for injury to feelings without being specifically pleaded, and what must be pleaded if aggravated damages are to be awarded. In making my decision I took the view that the matters to which Mr Caldecott's submissions are directed do not raise any unfairness to the defendant having regard to the way the claim was notified and dealt with in the correspondence.

28. Mr Caldecott also drew attention to the fact that a statement made in open court is protected by absolute privilege, whereas a defendant's apology published pursuant to s.3(2) is not. Judges considering whether to permit a statement to be read in open court must always consider whether the statement would be defamatory of third parties (if it is a statement agreed between the parties), and (if it is a unilateral statement by a claimant) whether it might also be defamatory of the defendant. In the present case the Defendant has not suggested that the draft statement of the Claimant is defamatory of any individual or of the Defendant itself, and I did not, and do not, see any unfairness to the Defendant or anyone else on that account in this case.