Neutral Citation Number: [2014] EWCA Civ 1411

Case No: A2/2013/3111

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HH Judge Moloney QC sitting as a Judge of the High Court
[2013] EWHC 3182 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2014

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LADY JUSTICE SHARP

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Between :

(1) Reed Elsevier UK Limited (T/A LexisNexis) **(2) Reed Business Information Limited (T/A Community Care Inform)**	**Appellants / Defendants**
- and -	
Raymond Russell Bewry	**Respondent / Claimant**

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Justin Rushbrooke QC and **Yuli Takatsuki** (instructed by **Aslan Charles Kousetta LLP**) for the **Appellants**
Antony White QC, Diego F. Soto-Miranda and **Ben Silverstone** (instructed by **Bindmans LLP**) for the **Respondent**

Hearing date : 7 July 2014

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Judgment

Lady Justice Sharp :

1. This is an appeal from a decision of HH Judge Moloney QC of 10 October 2013, granting the claimant's application made pursuant to section 32A of the Limitation Act 1980 to disapply the limitation period in his proceedings for libel and dismissing the defendants' application to strike out the claimant's claim under CPR rule 3.4(2).

2. Section 4A of the Limitation Act 1980 provides that an action for defamation or malicious falsehood shall not be brought after the expiry of one year from the date on which the cause of action accrued (which in libel claims is the date of publication).

3. Under the law which applies to this claim, a separate cause of action accrues for each individual publication of a libel, which is then subject to its own limitation period: see *Duke of Brunswick v Harmer* [1849] 14 QB 185. [1]

4. Section 32A of the Limitation Act 1980 (section 32A) enables the court to disapply section 4A. It provides as follows:

> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person he represents,
>
> the court may direct that the section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.
>
> (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
>
> (a) the length of, and reasons for, the delay on the part of the plaintiff;
>
> (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A –
>
> (i) the date on which any such facts did become known to him, and

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[1] Section 8 of the Defamation Act 2013 (in force from 1 January 2014) has changed the position, by the introduction of the single publication rule. It provides that for purposes of section 4A of the Limitation Act 1980 a cause of action in defamation will be treated as having accrued on the date of the first publication, if a person publishes a statement and subsequently publishes that statement or a statement which is substantially similar.

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely –

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

5. The discretion to disapply is a wide one, and is largely unfettered: see *Steedman v BBC* [2001] EWCA Civ 1534; [2002] EMLR 17 at 15. However it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional.

6. *Steedman* was the first case in which the Court of Appeal had to consider the manner in which a judge exercised his discretion pursuant to section 32A of the Limitation Act 1980. Brooke LJ said at para 41 that:

> "whilst it would be wrong to read into section 32A, words that are not there, the strong policy considerations underlying modern defamation practice which are now powerfully underlined by the terms of the new Pre-action Protocol for Defamation, tend to influence an interpretation of section 32A which entitles the court to take into account all the considerations set out in this judgment when it has regard to all the circumstances of the case."

7. The Pre-action Protocol for Defamation says now, as it said then that "there are important features which distinguish defamation claims from other areas of civil litigation…in particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only one year and almost invariably a claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation." See Civil Procedure, vol. 1, 2014, paragraph C6-001, para 1.4.

8. The onus is on the claimant to make out a case for disapplication: per Hale LJ in *Steedman* at para 33. Unexplained or inadequately explained delay deprives the court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not "get on with it" and provides vague and unsatisfactory evidence to explain his or her delay, or "place[s] as little information before the court when inviting a section 32A discretion to be exercised in their favour …should not be surprised if the court is unwilling to

find that it is equitable to grant them their request." per Brooke LJ in *Steedman* at para 45.

9. The claimant is a local authority approved foster carer and according to the Particulars of Claim, is the current Chair of the Norfolk Foster Carer Association. The first defendant owns and operates the LexisNexis website, which provides, amongst other things, access to LexisNexis case reports and other legal materials. The second defendant owns and operates the Community Care Inform (CCI) website, a subscription-based online resource for professionals working with children and families.

10. These libel proceedings are brought in respect of words which were part of a legal case note (the case note) published by the defendants on their respective websites. The case note concerned proceedings for judicial review brought by the claimant in which an ex tempore judgment was given by Holman J. on 6 October 2010 (see *R (on the application of Bewry) v Norfolk CC* [2010] EWHC 2545 (Admin)). They were brought because the claimant was dissatisfied with the Council's decision to remove two boys he was fostering, from his care. The application succeeded on the ground that the Council had failed to consult the claimant before making the removal decision.

11. The case note was prepared by the first appellant (LexisNexis) before a transcript of the judgment was available, and placed on their website on 7 October 2010. The case note was only accessible to subscribers. On 10 January 2011 the second appellant (CCI) placed the case note on a part of their website, which was accessible only to subscribers. A short extract from the case note – the words complained of by the claimant in these proceedings – also appeared as an automatically generated "snippet" on 10 January 2011 on a different part of CCI's website which was accessible to the public, though the snippet made clear to subscribers that they would need to subscribe or log on to see the full case report. The claimant saw it there on 27 February 2012 and immediately complained to CCI about it.

12. The relevant words were these:

> "Details of the case
>
> The claimant was a single man who, in February 2006, became an approved foster carer for the defendant Local Authority.
>
> Subsequently he was approved as a level five foster carer, which was the highest possible level.
>
> He had looked after two children RS since 6 March 2009 and SP since 27 May 2009.
>
> In August, the claimant required a respite break and both young men were moved to respite accommodation for two weeks.
>
> <u>From early June, concerns were raised about the claimant's inappropriate behaviour</u>. [underlined by the claimant in the Particulars of Claim]

> The defendant local authority began to have concerns regarding the suitability of the claimant to act as a foster carer.
>
> He was emailed in July and asked to co-operate with the Authority, who specifically registered their concern that 'you are refusing to be supervised in caring for the boys'.
>
> Further correspondence was sent by the Authority on 29 July, registering a further concern that the social worker and the claimant had not spoken 'face to face' since 9 June.
>
> The authority appointed a social worker to investigate, however, the claimant refused to co-operate with her."

13. The meaning attributed to these words in the Particulars of Claim is that the claimant is a paedophile.

14. After they received the claimant's complaint, on 28 or 29 February 2012 CCI took down the case note and the snippet from their website. In a letter to the claimant of 6 March 2012 CCI confirmed they had taken down this material, and offered to publish a correction (accessible both to subscribers and non subscribers). They provided him with an amended case summary, informed him that the case report had originally been produced by LexisNexis; and provided him with a copy of the case report. It follows from what the claimant was told in this letter, that he had knowledge of all the facts necessary to bring an action for libel against both defendants on the date he received it.

15. On 11 April 2012, CCI confirmed to the claimant that it would not be republishing the case summary pending further consideration of the claimant's complaints, and referred the matter to LexisNexis. At the end of April 2012, LexisNexis contacted the claimant. On 10 May 2012, LexisNexis provided a substantive response to the claimant, and confirmed it would publish a newly rewritten case report, an apology and retraction. On 11 May 2012 it removed the case report from its website. It subsequently published an apology and a revised case report, both of which continue to be published and about which no complaint is made. The apology said: "LexisNexis would like to state that this digest had been amended in accordance with the official transcript from the Queen's Bench Division, Administrative Court and regret any embarrassment caused to Mr Bewry as a result of the original report."

16. In the event this claim was not commenced until the 6 February 2013. This was some two years and four months after the words complained of were first published and some eleven months after the claimant had knowledge of all the facts necessary to bring a claim against both defendants.

17. The Particulars of Claim settled by counsel (Mr Soto-Miranda) on the 4 February 2013, and served on 6 February 2013 said these were "Protective Proceedings" "issued by the [c]laimant acting as litigant in person"; and claimed damages for libel (limited to £100,000) for the publication of the case note on the LexisNexis and CCI

websites from October 2010. The Particulars of Claim contained no reference to any limitation issues raised by the claim.

18. The claimant had the benefit of the more generous position that applies under the common law than would now arise under section 8 of the Defamation Act 2013 and could rely on each separate publication as a separate cause of action. Nonetheless the effect of the statutory regime was that the limitation period had expired in respect of any publications occurring before the 6 February 2012. Subject to any application to disapply under section 32A, the claimant's claim was accordingly confined to publications occurring between 6 February 2012 and 5 February 2013. On the facts, the relevant period when non statute-barred publications could have occurred, was even shorter than that, since the second appellant had removed the words complained of from its website on the 28 or 29 February 2012, and LexisNexis had done so on 11 May 2012.

19. The defendants investigated the number of times the words complained of were accessed during that relevant period. Not surprisingly perhaps, it transpired that the number of publications (or hits) was minimal. Between 6 February 2012 and 11 May 2012 there was one hit (at most) in the jurisdiction on the LexisNexis website (I say at most, because the "hit" occurred on 11 May 2012, which was the day on which the case report was taken down by LexisNexis and then revised). And between 6 February 2012 and 28/29 February 2012 there were five hits on the CCI website. Two of these were attributable to CCI employees, and one it can properly be inferred was to the claimant. Thus the sum total of relevant non statute-barred publications was three in all: one, for the second defendant, and two, for the first defendant.

20. This evidence led the defendants' solicitors to write to the claimant on 6 March 2013 inviting him to withdraw his claim. Given the explanation the claimant was later to give for delay, it is relevant to note that the defendants referred expressly in this letter to the limitation period for defamation actions and its effect on his claim. The claimant in his response did not say that he was not aware of the limitation period. He said he wanted to wait for the outcome of LexisNexis' investigation into his complaint before issuing proceedings, and he was aware of the time limits for filing applications.

21. On 8 March 2013 the defendants issued their application to strike out the claim on the grounds of *Jameel* abuse: see *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75. It was their case that the extent of publication (which was not statute barred) in the twelve months leading to the issue of the claim form was minimal, damages were likely to be very modest indeed and the claimant had no prospect of obtaining a final injunction. He had, moreover, achieved a substantial measure of vindication through the removal of the words, the publication of the apology and revised case report many months earlier (which was still on-line) linked to the original judgment of Holman J which was publicly available and set out the full facts and outcome of the case.

22. In the event, the claimant's application to disapply the limitation period (which the judge allowed) was not made until the 24 September 2013. This was seven months after the proceedings were issued, and shortly before the hearing of the defendants' *Jameel* application to strike out the claimant's claim. The claimant's application was supported by a very lengthy witness statement, only one paragraph of which

(paragraph 95) dealt with the reasons for the claimant's delay in issuing the proceedings. He said this:

> "95. As a Litigant in Person it is only reasonable that I should be allowed to make an N244 Application for a time extension as per s.32A(2) Limitation Act 1980 to cover the period of my claim. This period would start from 7th October 2010 in relation to LexisNexis and 10th January 2011 for CCI. These are the dates when the case summaries were published by the respective Respondents.
>
> February 2012 I engaged with the Defendants in good faith, trying to resolve the issues without resorting to litigation. Their failure to provide the report of their investigation and their failure to respond to my emails for a period of six weeks is evidence that they had no intention of resolving the issues. I decided therefore to take legal advice, at which point I was informed that the limitation period for libel cases is only one year; I understood immediately that the Respondents, aware of this fact, had dragged things out to ensure that any legal action I might initiate would be out of time had I waited any longer for them to complete their investigation. It is unreasonable that these professionals, who from the start had instructed counsel in relation to my complaint, should now penalise me for engaging with them in an effort to resolve the issues without costly litigation.

23. The judge said that if he had refused the claimant's application to disapply the limitation period it was very probable he would have allowed the *Jameel* application because "the claim within the limitation period is very small and would probably not be worth pursuing." Mr White told the court on this appeal that he did not have express instructions to concede the *Jameel* issue, but neither did he address any arguments to us on it, still less suggest that the judge's conclusions in this respect were wrong.

24. The argument before us has therefore focused exclusively on the judge's exercise of discretion to disapply the limitation period.

25. The defendants' principal contention on this appeal is that there was serious and unexplained delay on the part of the claimant in this case. The delay was excessive in the context of a limitation period of one year in the context of a libel claim to which special considerations apply. The judge wrongly failed to take into account all the delays that had occurred, including from the time that proceedings were issued. But in any event, the reasons given by the respondent for the delay were vague and manifestly inadequate and certainly not of a sufficiently precise or compelling nature to discharge the heavy onus on him as the applicant under section 32A or to justify the judge's exercise of such an exceptional discretion.

26. In my judgment, the defendants' arguments are well-founded.

27. There was no dispute that the period of delay overall was substantial as the judge said. The question was why it had occurred. The first fifteen months were obviously accounted for by the fact that the claimant did not know about the case report. This was common ground. What was (and is) controversial, is why there was a substantial delay after that.

28. The judge accepted the claimant's case that his delay in issuing his claim was justified because (a) he was seeking to resolve the issues with the defendants through negotiation and without resort to litigation; and (b) as a litigant in person, he was informed of the one-year limitation period when he took legal advice once it became clear that the defendants had no intention of resolving the issues. With respect, I think the judge was wrong do so.

29. A careful and objective analysis of the correspondence (through which we have been taken at some length) demonstrates in my view that the object of the correspondence was not "continued discussions with regard to redress for the publications", or "bona fide negotiations for a further year" as the claimant asserted. Instead, as Mr Rushbrooke submits, the claimant engaged in repetitive and protracted correspondence – with some notable and unexplained delays - in which the pursuit of vindication or legal redress assumed at best only a peripheral role. The suggestion that the defendants were dragging the matter out in some way is not, it seems to me, borne out by the documents. It is notable that the claimant's correspondence contained only sporadic references to the particular sentence about which complaint is now made, and made no reference to the meaning (of paedophilia) now complained of. What the claimant wanted was an investigation into how and why "the lies" came to be published, and a finding of "malice" on the part of the court reporter. It seems to me that the factual link between the claimant's protracted correspondence and the claim he then made in these proceedings is missing.

30. By 26 July 2012 LexisNexis said that they had taken all reasonable steps to resolve his complaint and there were no further steps they would take in respect of the matter. By that stage, at the latest, the claimant knew he would need to sue to progress his claim. But he did not then do so.

31. Mr White suggests that the claimant was entitled to wait until the defendants carried out the investigations he wanted them to make before issuing proceedings. I cannot accept that submission in view of Mr White's (correct) concession that the investigations the claimant wanted the defendants to pursue were legally irrelevant to his cause of action. The position is not analogous it seems to me, with the position of a claimant who wishes to await the outcome of an investigation into his own conduct before bringing proceedings for libel, rather than have two such enquiries proceeding in parallel (where there are criminal proceedings in progress touching upon the same issues for example).

32. What then of the claimant's knowledge of the limitation period? The judge made a finding that it was likely that the claimant did not become aware of the existence of the one-year limitation period for libel until early 2013. And there is no doubt that he relied heavily on this finding, in deciding that the claimant had acted reasonably once he knew the facts relevant to his claim, and then in exercising his discretion to disapply the limitation period.

33. Thus the judge found that the claimant "spent that time in negotiation and, I accept that he spent it unaware that there was a one year limitation period which was beginning to gnaw away at his claim." He found that the claimant had not acted promptly but he had not pursued the correspondence "with the urgency with which no doubt it would have been pursued if he had been aware of the limitation period". And he found the claimant had acted reasonably, "allowing for the fact that he was ignorant of the limitation period." The judge went on to say that "If a person is fully advised as to the limitation period then, in the claimant's situation they would have issued a claim form immediately for protective purposes" but the defendants were "not in a dissimilar situation by reason of the claimant's original complaint in February 2012." When exercising his overall discretion the judge said the claimant "entered into bona fide negotiations for a further year in ignorance of the limitation period."

34. There are two points to make about this. First, in my view, there was no sure evidential basis for finding that the claimant did not know of the limitation period until early 2013, and I do not accept Mr White's contention that such an inference could or should have been drawn from the material before the judge. The relevant paragraph of the claimant's witness statement did not state when he took legal advice; indeed it seems to have been deliberately couched in vague language, which obscured rather than clarified what was (on the claimant's case at least) this important factual issue. Nor did the witness statement say that the claimant was not aware of the relevant limitation period before he took legal advice. I mention this point because the claimant is no stranger to the civil courts as the judge himself observed and has been involved in a considerable amount of litigation in the last 15 years. It is not necessary to refer to any of that litigation, except to say that it has involved proceedings for judicial review and employment claims with much shorter time limits (strictly applied) than are involved here. I think Mr Rushbrooke is entitled to say that this should have led to a sceptical rather than a benevolent interpretation of the claimant's evidence.

35. Mr White submits that the judge was entitled to base his finding on a combination of what the claimant said in his witness statement, and what his counsel told the judge during the course of the hearing. Generally, I do not think it would be appropriate for an evidential gap to be plugged in this way. But in any event, what the judge was told at the hearing did not help the claimant. The claimant did not attend the hearing. Counsel (Mr Soto-Miranda) in answer to a question from the judge, said he was first consulted by the claimant at the end of 2012, but he had no knowledge of when the claimant was advised about the limitation period. After this exchange, the judge said: "So we don't know when [the claimant] found out. That's one relevant date I wasn't sure of."

36. Secondly, Mr Rushbrooke submits, rightly in my judgment, that ignorance of the limitation period will rarely if ever, be a factor which carries any or any significant weight given the policy reasons underlying the one-year limitation period for libel claims. A claimant is expected to pursue his complaint promptly irrespective of the limitation period and whether he knows about it, for the simple reason that not to do so is inconsistent with a genuine wish to pursue vindication of his character promptly and vigorously, which is what the law requires. Ignorance could only be relevant in

the most marginal type of case, where a claimant is actively misled for example, but on its facts this was not such a marginal case.

37. I do not think we are assisted on this point by reference to the rather different position which arises when a claimant in an action for personal injuries is ignorant of the fact that he or she has a civil claim at all. This was the position considered in *Halford v Brookes* [1991] 1 WLR 428 and *Coad v Cornwall and Isles of Scilly Health Authority* [1996] 1 WLR 189 in relation to the application of section 33 of the Limitation Act, which provides for the discretionary exclusion of time limits for actions in respect of personal injuries or death. There is a material difference it seems to me between not knowing you have a claim at all (so you are not in a position to bring it let alone progress it), and knowing you have a claim, but not progressing it so it becomes time-barred. It is also the case that sections 33 and sections 32A, though similar, are different in a number of respects. Both sections require the court to have regard to all the circumstances when deciding whether it would be equitable to disapply the relevant time limit. But the factors to which the court must then have regard in relation to those different causes of action, are not the same. Under section 33, one of those factors is "the steps, if any, taken by the plaintiff to obtain…legal… or other expert advice and the nature of any such advice he may have received": see section 33(3)(f) of the Limitation Act 1980. The issue of the legal advice a claimant has or has not received is thus one of the central factors that the court must consider on the basis of the material put before it (as occurred in *Halford* for example, see p.432D). In any event, as I have said, the time limits for libel actions raise special issues that do not arise in personal injury claims.

38. The judge made no mention of the issue of delay after the proceedings were issued when going through the checklist of section 32A factors, and it is fair to assume that he thought this was irrelevant to the exercise of his discretion. As I have said, in my view this was the wrong approach. I do not accept Mr White's contention that the issue of post proceedings delay could only be relevant to section 32A(2) – that is to its consideration of " all the circumstances of the case". Section 32A(2)(b)(ii) requires the court to consider "the extent to which [the claimant] acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action." In my view, as a matter of construction, this is a question that looks forward to all of the claimant's conduct from the point at which he had the relevant knowledge. The delay that occurred after the proceedings were issued was significant in my judgment. It is a somewhat unusual feature of this case that the claimant knew there were significant limitation problems with his claim from the outset, if not before, but did not then issue his application to bring the otherwise time-barred publications into his claim for some 6 ½ months, a delay that he did not explain.

39. It is true, as Mr White submits, that the judge who has considerable experience in this field, adopted a structured approach to claimant's application by setting out the various factors he had to consider under section 32A and that he gave his conclusions on each factor before standing back and looking at the wider picture in order to determine whether it was equitable to disapply the limitation period. But in my view, the judge's exercise of his discretion was flawed.

40. Looking at the matter afresh, and considering the balance of prejudice that arises from the loss by the defendants of their limitation defence, and the loss by the claimant of

the time-barred parts of his claim, I do not think the claimant has made out a case for the disapplication of the limitation period in relation to his claim. We are now four years on from the initial publications, and the claimant has failed to provide any or persuasive evidence of the reasons for the delay between February 2012 and September 2013. This is not a case in my judgment, where the prejudice to the defendant from the loss of the limitation defence is so fortuitous that it is balanced out of existence, by prejudice to the claimant in losing a claim which the defendant ought in justice and fairness to meet: see *Brady v Norman* [2011] EWCA Civ 107; [2011] EMLR 16 at 21.

41. In the result, the claimant is left with a claim which falls squarely within the *Jameel* jurisdiction. There are a miniscule number of publications, it cannot be said that the claim is brought to vindicate his reputation in respect of those publications, or that any vindication would inure if he did so. Damages would be minimal. The publications complained of have long since been taken down, and the defendants have made it clear they will not be republished. There is no threat therefore of any wider publication and there can be no question of any need for an injunction. Mr White was right in my judgment not to argue that we should allow the claim to continue if the appeal on the limitation issue was allowed.

42. For the reasons given I would allow the defendants' appeal, and I would dismiss the claim.

Lady Justice Macur:

43. I agree.

Lord Justice Lewison:

44. I also agree.