Case No: HQ13D03140

Neutral Citation Number: [2014] EWHC 647 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2014

Before :

SIR DAVID EADY
(Sitting as a High Court Judge)

- -

Between :

DONALD GEORGE JERRARD	**Claimant**
- and -	
(1) HAMISH BLYTH **(2) JEREMY AUSTIN OLSEN** **(3) ANTHONY GROVES**	**Defendants**

- -
- -

The Claimant appeared in person
Yuli Takatsuki (instructed by **Barlow Robbins LLP**) for the **Second Defendant**
Victoria Shore (instructed by **Harveys Solicitors LLP**) for the **Third Defendant**
The First Defendant was not represented

Hearing date: 21 & 24 February 2014

- -

Judgment

Sir David Eady :

The factual background

1. These prolonged and no doubt expensive libel proceedings arise out of one word published on or about 28 July 2011 on a website of interest mainly to those living in and around Liphook in Hampshire (www.liphook.co.uk). The post appeared to emanate from a user named Graeme Irwin. I understand that the offending word was removed about two months later. The Claimant, generally known as Don Jerrard, is a retired solicitor who has been active in local politics and was elected to the Bramshott and Liphook Parish Council in May 2011. Although he was not named in the post in question, there was reference to certain individuals who had been recently elected, including a "disbarred solicitor", and it is the Claimant's contention that some readers would have reasonably understood this to refer to him. The word "disbarred" was in due course replaced by the unobjectionable description "*former* solicitor". It is not disputed that "disbarred" would be a false description if it had indeed been understood as referring to the Claimant, since he had neither been "disbarred" nor "struck off" (which would be the more accurate terminology for any solicitor who had been deprived of the right to practise).

2. Although it may not have been read by very many readers (compared to the readership of a newspaper), nevertheless it can hardly be doubted that to allege of a solicitor that he has been "struck off" is defamatory and likely especially to cause damage to such a person standing for or elected to public office (at whatever level).

3. The Claimant told me that what he wanted primarily was a prompt withdrawal and apology. A letter of complaint was written in October 2011 to the Second Defendant, Jeremy Austin Olsen, suggesting that he must have been the author of the post because Graeme Irwin was the name of one of his work colleagues (who had himself already denied any responsibility) and, what is more, the author had revealed a detailed knowledge of the affairs of Liphook Parish Council. This, says the Claimant, would tend to point towards the Second Defendant (he having formerly been a member of the council himself).

4. The response of the Second Defendant's solicitors on 24 November 2011 not only denied any responsibility on his part but also attributed the post to the First Defendant, who at the time of publication had been working on a temporary basis in the same office with the Second Defendant. What is more, he had expressly admitted his own responsibility. The Claimant, however, does not accept the truth of the Second Defendant's denial or of the First Defendant's admission. That is despite the fact that his own particulars of claim, served on 22 November 2012, currently plead the First Defendant's admission and assert that he was repeating an allegation made to him by the Second Defendant (which he, the Second Defendant, intended should be passed on). The Claimant now wishes to make a different case and to demonstrate, at trial if necessary, that the situation is analogous to the recently notorious case in which the wife of a member of Parliament had tried to exonerate her husband of liability for a speeding offence by pretending that she had been driving at the material time. In other words, the Claimant wishes to contend that the First Defendant is simply trying to let the Second Defendant "off the hook" by falsely claiming responsibility for the offending post. These submissions were developed by the Claimant at some length in the course of the hearing on 21 February 2014. It soon

became apparent both that these new allegations were very serious (implicating the First and Second Defendants apparently in a conspiracy to pervert the course of justice) and that this radically different case required a clear and express pleading – for which permission would obviously be required. Ms Takatsuki considered the matter with her client over the intervening weekend and, on Monday 24 February, I agreed to adjourn the relevant part of the application so that (i) an amended statement of case could be drafted and (ii) an opportunity given for the relevant parties to prepare and submit evidence on the issue of whether permission should be granted.

5. Exactly *why* the First Defendant is supposed to have made the false admission is at the moment, at least to me, unclear. Nevertheless, in light of those admissions, subsequently confirmed in an email as long ago as 26 February 2012, I understand that judgment was entered in default against him.

6. An audio recording was played before me in court, on 21 February, of what apparently passed between the Claimant and the First Defendant during a visit to the address where the First Defendant now lives in Scotland. He and his wife called upon him, I was told, in July 2013. The First Defendant reacted with a good deal of abuse and threatening language. But none of this really impinges on the applications now outstanding before the court, which relate primarily to the Second and Third Defendants.

7. The Second Defendant was served with the proceedings about a year after his solicitors' denial, but without any further communication or warning, on 22 November 2012. He received both the claim form and particulars of claim. The Third Defendant was never served and only learned indirectly that there were proceedings outstanding against him. Ms Shore accordingly argued before me, on 21 February, that he was entitled to clarity and certainty. She asked that the proceedings against her client should be formally set aside. On that occasion, I acceded to her application and awarded the Third Defendant costs against the Claimant on the indemnity basis. I indicated that I would hand down my reasons in writing in due course. That is the primary purpose of the present judgment.

The outstanding applications now before the court

8. A number of applications were listed before me on 21 February but, for one reason or another, the only substantive issue I was able to resolve on that occasion was the Third Defendant's application, and most of the others had to be adjourned to a further hearing date in the near future. The applications listed were as follows:

    i) the Third Defendant's application dated 17 September 2013 to set aside the proceedings against him and for costs to be granted on the indemnity basis;

    ii) the Second Defendant's application dated 23 September 2013 to strike the claim out under CPR Part 3, alternatively for summary judgment under CPR Part 24;

    iii) an application on the Second Defendant's part that the costs already awarded in his favour against the Claimant on his application to vary directions, which was dated 7 October 2013, be summarily assessed (I did so on 24 February);

iv) an application by Mr Mark Harvey of Harveys Solicitors LLP (the firm currently representing the Third Defendant) that he be personally joined in the proceedings, so as to be able to protect his own interests in the light of what he contends are "scandalous" allegations contained in a letter addressed to the court from the Claimant, and also in witness statements submitted by him, in the context of the Second Defendant's outstanding applications;

v) an application by the Second Defendant for the costs incurred in meeting an application by the Claimant for an adjournment, which was dated 17 February 2014.

The Third Defendant's applications

9. As I have said, I was able to deal with the application of the Third Defendant, dated 17 September 2013, which had to be issued in order to dispose finally of the claim against him. Although he was never served with the claim issued on 25 July 2012, there is unhappily a lacuna in the CPR, which came to be considered by the Court of Appeal in *Aktas v Adepta* [2011] QB 894. From the analysis in that case, it clearly emerges that the effect of issuing proceedings against a party who is not served within the prescribed four-month period is not that the claim automatically lapses, but rather that it remains "in limbo" and thus requires to be given a formal *quietus* – either by serving a notice of discontinuance or, if the relevant claimant fails to take this step (and to accept the usual costs consequences), by an order of the court to "set aside": see the judgment of Rix LJ at [19]-[21].

10. The Claimant's solicitors, Potter Owtram & Peck, behaved inappropriately so far as the Third Defendant was concerned. He learned that the proceedings had been issued against him only in May 2013, when he was notified by the court that they had been transferred from the Chancery Division to the Queen's Bench. He had been given no notification at all before the proceedings had been issued on 25 July 2012 – let alone "at the first opportunity" (as required by the terms of the pre-action protocol). Had it not been for the error of the solicitors' London agents in issuing the claim in the wrong division in the first place, it might be that he would have remained in ignorance of the claim for even longer.

11. The Third Defendant also later discovered that the Claimant had informed the Parish Council at a committee meeting on 26 November 2012 that there were "civil and criminal proceedings" outstanding against him – even though he had not had the courtesy to serve or otherwise notify the Third Defendant of the relevant civil proceedings. (The allegation about criminal proceedings was also untrue.)

12. On 2 September 2013 a notice was issued on the Third Defendant's behalf under CPR 7.7 requiring the Claimant either to serve the claim form or discontinue. The solicitors' response was by letter dated 5 September. Instead of apologising, or making it clear that the proceedings would be discontinued, they seem to have been more concerned with scoring points. The letter contained the following passage:

> "As we stated on the telephone yesterday, a claim form was issued late in July 2012 with your client being named as a third defendant on a protective basis. You will appreciate that any

> claim form (together with particulars of claim) must then be served within the following four months.
>
> As he was entitled to do, our client elected not to proceed with any claim against your client. Thus, no claim was made against your client in the particulars of claim.
>
> You are aware that the claim is in defamation. The one year time limit has long since expired and your client was not served with anything within the time allowed under the CPR. Thus there is no extant claim against your client. After bearing in mind the overriding objectives set out in CPR 1, we find it difficult to ascertain what your client is seeking to achieve by way of this correspondence. Alternatively is your client implying that he wishes to waive any limitation points so that our client can sue him after all?"

13. The solicitors' stance as to the status of the proceedings, vis-à-vis the Third Defendant, did not accord with the Court of Appeal's analysis in *Aktas v Adepta*, since unfortunately there *was*, at that stage, an "extant claim" against him. It had thus been entirely reasonable for his solicitors to call for clarity and, in particular, to require the service of a notice of discontinuance. The remainder of the letter appears to have been primarily concerned with a challenge to the firm of Metcalfe Harveys (as it was then called) continuing to act on behalf of the Third Defendant (on grounds of alleged conflict of interest). There then followed this paragraph:

> "In the light of these points please confirm that you agree not to act for your client in respect of the issues which you have raised with us in correspondence. No doubt we may thereafter hear from any new solicitors instructed."

It thus appears that the Claimant's solicitors were not only wasting costs (by not bringing matters to a speedy conclusion) but actually encouraging further costs to be incurred by the instruction of a fresh firm of solicitors. None of this accords with the overriding objective.

14. A further letter had, therefore, to be sent on the Third Defendant's behalf on 11 September 2013, setting out why discontinuance was appropriate. No response was received and it was only in the course of submissions before me that the Claimant finally offered to serve such a notice.

15. Solicitors are, of course, required to behave professionally in relation to any persons they choose to join as parties to court proceedings. They should not simply join people for the sake of it and should only do so after prior notification in a letter before action. Anyone joined is entitled to know where he stands and to be served with the proceedings or, in due course, with a notice of discontinuance. He should not be left "in limbo" and is entitled to clarity and certainty. There should be no obfuscation and he should not be put in the position of having to incur costs unnecessarily.

16. In view of this history, I indicated on 21 February that I would make an order to "set aside" the claim against the Third Defendant (in accordance with the terminology

adopted in *Aktas v Adepta*) and I would also order costs on the indemnity basis. The Third Defendant had to incur the expense of instructing solicitors to protect his interests when this should never have been necessary. There is no reason why he should be out of pocket. Moreover, the solicitors should not have allowed him to linger on in this state of uncertainty. Indemnity costs seem to me to be the appropriate order, since the conduct of the Claimant and his solicitors towards the Third Defendant "takes the case out of the norm": see *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879, at [33] (*per* Lord Woolf) and [39] (*per* Waller LJ). The whole exercise was quite unnecessary. I indicated that I would order that £15,000 be paid on account (subject to the order being suspended in the event of permission being granted to appeal).

17. Those are my reasons for granting the Third Defendant's application. The other matters remain outstanding.