Neutral Citation Number: [2016] EWHC 2761 (QB)

Case No: HQ15D00037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2016

Before :

SIR DAVID EADY
Sitting as a Judge of the High Court

- -

Between :

(1) KHALID UNDRE
(2) DOWN TO EARTH (LONDON) LTD **Claimants**

- and -

THE LONDON BOROUGH OF HARROW **Defendant**

- -
- -

Roger Birch (Direct Access) for the **First Claimant**
Adam Wolanski (instructed by **BLM**) for the **Defendant**

Hearing date: 17 October 2016

- -

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.

.....

SIR DAVID EADY

Sir David Eady :

1. These libel proceedings were commenced on 6 January 2015 in respect of a "news release" issued by the London Borough of Harrow on 7 January 2014 (i.e. just before the expiry of the 12 month limitation period). An offer of amends was made under the statutory provisions contained in ss.2 to 4 of the Defamation Act 1996 and it was accepted on 19 May 2015. It is now my task to assess compensation in accordance with that regime because the parties have been unable to reach agreement on a suitable figure themselves. The process of making the assessment accords with the awarding of conventional libel damages, which are intended to compensate for hurt feelings and injury to reputation and, where necessary, to serve as an outward and visible sign of vindication.

2. The first Claimant was a restaurateur who was described in the particulars of claim as owning the Down to Earth vegan restaurant in Kensington High Street, although with effect from 26 September 2013 it was operated by the second Claimant. It is a company of which the first Claimant is the owner and a director. Prior to that, the restaurant was operated by another company called Down to Earth (Kensington) Ltd which had gone into voluntary liquidation with a deficiency of some £500,000.

3. A hearing took place earlier this year before Warby J, who ruled on 26 April *inter alia* that the words sued upon did not refer to or defame the second Claimant: [2016] EWHC 391 (QB). It therefore takes no further part in the proceedings.

4. The first Claimant also owns some land in Harrow on which he was keeping some rare breed cows during the winter of 2012-2013. The Defendant, being the borough council responsible for the enforcement of animal welfare legislation in the relevant area, instituted proceedings against him in the Willesden Magistrates' Court. It was alleged, in broad terms, that he had neglected the welfare of his cows during the period of January and February 2013. He pleaded not guilty and was tried on six counts before District Judge Jabbitt on 26 and 27 November 2013. A detailed written decision was handed down on 20 December, which recorded that he had been found guilty on five of the charges:

   (1) Failing without lawful authority or reasonable excuse to ensure that the cattle owned by him were fed a wholesome diet;

   (2) Failing to take reasonable steps to ensure the cattle were fed at intervals appropriate to their physiological needs;

   (3) Failing to take reasonable steps to ensure all had access to a suitable water supply and were provided with adequate fresh drinking water each day or were able to satisfy their fluid intake by other means;

   (4) Failing to ensure that all animals on his holding born after 31 December 1997 were identified by an ear tag;

   (5) Failing to dispose without undue delay of a cattle carcass.

   The first three offences listed were contrary to the Welfare of Farm Animals (England) Regulations 2007. The others related to contraventions, respectively, of the

Cattle Identification Regulations 2007 and the Animal By-Products (Enforcement) (England) Regulations 2011.

5. In addition to the bare fact of the convictions, the written decision contains a number of pertinent observations which were obviously also in the public domain. The District Judge referred to "significant underfeeding over at least several weeks" and also found that "[the first Claimant's] enthusiasm for looking after the herd particularly in the bad weather had waned". He mentioned that according to the evidence "only once was water seen at the site". He had come to the overall conclusion that "the herd suffered, particularly the cows that were pregnant or had recently given birth". In due course, following submissions, the first Claimant was sentenced to community service and ordered to make a contribution to the prosecution costs.

6. It is important for present purposes to note that none of the convictions or findings related to the cause of death of any cow or calf.

7. On 7 January 2014, the Defendant issued a "news release" relating to the recent convictions which undoubtedly received a good deal of publicity not only locally but also nationally. It contained the following first sentence: "A restaurateur whose neglect led to the deaths of three cows at a Harrow farm has been convicted of mistreating his animals and sentenced to community service". Those were the only words selected for complaint in these proceedings. Reference was made, however, to other statements emanating from the Defendant, and also to republications by others, by way of aggravating damages.

8. In particular, the news release contained further material about the outcome of the proceedings and concluded with a comment from the leader of Harrow Council, Susan Hall:

> "This was an appalling offence of animal cruelty, made all the more grotesque by the cynical way in which this man paraded himself as a champion of ethical food standards. Our officers work extremely hard to prosecute these complex cases, and it is down to their hard work that these animals' suffering is over, and their owner brought to justice."

9. Mr Birch characterised those comments as a "personal attack". No doubt they were, but the fact is that they were not, for whatever reason, part of the words complained of. As to the natural and ordinary meaning of the words actually pleaded, Warby J decided, at [34], that "… there is no difficulty in concluding that the paragraph complained of, read in the context of the news release as a whole, bears the meaning that the first claimant so neglected his cattle that three of them died".

10. At paras [65]-[66] of his judgment, Warby J drew attention to some of the other "serious criticisms of the first claimant" contained in the news release of which no complaint was made:

> "Mr Wolanski identified five, each of which the first claimant accepted was present: the animals were exposed in a field in sub-zero conditions; a cow was found dead in heavy snow

> having given birth unattended; the sentence and costs order; the comment of Susan Hill that the behaviour was 'appalling'; and the further comment that the matter was 'grotesque' because of its contrast with the ethical claims made."

The Judge continued:

> "The first claimant accepted that these other matters were damaging and were likely to have caused some loss by deterring customers. But he was adamant that the allegation of causing death was of a different and much more serious order. It was that which will have caused the greatest loss. I do not accept that the evidence or an objective assessment of the position supports that view."

11. This identifies one of the causation problems which is equally relevant to the first Claimant's case, which I am now considering. It seems to me that I have to be satisfied, on the balance of probability, that damage to his reputation and any hurt to his feelings is attributable specifically to the words complained of – rather than to any of the other passages in the news release. Warby J observed that it was difficult to see how the evidence enabled that burden to be discharged. Animal cruelty and/or neglect are serious matters in themselves and would certainly have affected his reputation adversely; perhaps especially so in the case of a cow giving birth in snowy conditions unattended. Yet there is no dispute in the case of this Claimant (unlike that of the corporate Claimant) that the publication of the words complained of would pass the threshold now set by s.1 of the Defamation Act 2013. Many of those who read the offending words clearly disapproved of his conduct in the strongest terms and there was, in particular, a good deal of criticism and abuse on social media and in comments attached to the various online publications. It is by no means obvious that this was prompted solely by the allegation that the cruelty/neglect actually led in some cases to death (as opposed "merely" to suffering and physical deterioration). The offer of amends, however, implicitly recognises that it may well have led to some of that harm.

12. A further difficulty for the first Claimant is that it is not easy to see when the damage would have begun. It cannot be pinned unerringly to the date of the news release. This was also a matter addressed by Warby J. At [76] he came to the following conclusions:

> "… It has been established that [the restaurant business] was hugely loss-making between January and September of 2013, and that there was a reduction in profitability during the autumn of 2013. But all of that was before the publication complained of. The reduction is probably due to adverse publicity surrounding the prosecution. Republication of the news release in the media in January 2014 probably had an adverse financial impact on the restaurant business, but the extent of that impact cannot be assessed. In any event, no causal link between that impact and the defamatory imputation complained of has, or more accurately would have been made out. The probability is that the impact was due to other aspects of the news release and

> consequent media publication. The most potent causal factor was customers shunning the business because it was associated with the first claimant, whose personal reputation had been harmed."

13. Warby J was primarily addressing the impact upon the second Claimant, but in relation to the first Claimant also it seems probable that damage to reputation had been caused well before the publication of the news release. That was likely because of adverse publicity attaching to the prosecutions, to the convictions themselves, and to the remarks made by the District Judge when he handed down his decision. That is not simply a matter of inference. It is important to note that this was positively advanced before the District Judge on the first Claimant's behalf by his counsel Mr Morrison (and, one may assume, on instructions). The damage caused to his reputation was clearly seen as a powerful mitigating factor. That is why it was mentioned. Evidence from Mr Morrison was placed before Warby J in the form of email correspondence. He believed he had said in mitigation that the first Claimant's house was "at risk because his social media pages had been trolled and business suffered". At [60], the learned Judge resolved the conflicting evidence in this way:

> "The clear evidence from both counsel is that the District Judge was told in the course of mitigation that the matter before the court had resulted in negative publicity causing serious financial loss. It does not matter a great deal for present purposes whether the court was told that the loss had been suffered by the business or by the first claimant personally. I am however confident that it was said that the first claimant had suffered such a loss. He, after all, was the defendant. The probability is that the court was also told that the business had suffered a large financial loss."

14. At [62], the Judge again referred to the "net sales summary" which showed a drop in revenues from September 2013 onwards and, at [63], he added that "… the overwhelming effect of the evidence is that all of this was prompted by revulsion at the conduct attributed to the first claimant".

15. Against this background, it becomes clear that the task of fixing compensation under the offer of amends regime is by no means straightforward. It is reasonable to infer that, in so far as distress and harm to reputation were caused by these events, the bulk of the damage was attributable to the original publicity surrounding the charges and convictions. That occurred before the publication of the words complained of and was not attributable to any allegation to the effect that the first Claimant was directly responsible for the deaths of particular animals.

16. Yet, as I have said, Mr Wolanski has acknowledged that, in order to take advantage of the offer of amends regime, his client must accept that the words complained of do pass the test of "serious harm" under s.1 of the 2013 Act. He tells me that the relationship between that provision and the offer of amends regime has not so far been considered. It is plain that they co-exist and must be made, where it is appropriate, to operate in harmony. Just as a defendant cannot make an unqualified offer of amends while contending that the words are true, so too it would not be consistent with the underlying objective to argue that the defamatory words are trivial. Furthermore, it is

not permitted to attack a claimant's character consistently with making such an offer, because it has long been recognised that by doing so a defendant is "putting his hands up" and acknowledging that he is in the wrong or, to put it another way, that the claimant "has won": See e.g. *Nail v News Group Newspapers Ltd* [2005] 1 All ER 1040, at [19].

17. Mr Wolanski recognised, therefore, the difficulty of contending on an application for the assessment of compensation that the award should be nominal, or even small. Yet he found himself wishing to advance in harness the somewhat paradoxical submissions (i) that the allegations had caused serious harm to reputation, but (ii) that there was no need for public vindication.

18. What is clear is that the court has to select an award which is confined to the "marginal" damage; that is to say, any harm caused specifically by the words complained of – in so far as it is possible to isolate such damage as being over and above that attributable to the earlier publicity, to which Warby J had attached so much significance, or to those parts of the news release of which no complaint has been made. This may be somewhat artificial, but that is by no means unknown in the context of awarding monetary compensation in respect of non-monetary loss.

19. Inevitably, in view of the fact that I have to proceed on the basis that the words complained of have caused serious harm, I must part company with the reasoning of Warby J at para [66] of his judgment. As I noted earlier, he came to the conclusion that the "marginal" element (i.e. the allegation of causing the deaths) was *not* different from, or of a more serious order than, the rehearsal of the convictions for neglect. I cannot take the same approach or I would be failing properly to implement the statutory requirements attaching to the offer of amends.

20. It is nonetheless acceptable, even in the context of an offer of amends, for the court to take into account mitigation, such as "relevant background context", which does not involve the defendant in mounting an attack upon the claimant's character (or seeking to "justify by the back door"). It is not as though the allegation of animal neglect had been made, as result of mistaken identity, against someone wholly innocent. The court has to compensate the individual claimant, with his or her particular characteristics, and the appropriate award will vary accordingly. There can never be one "right" sum regardless of the recipient. In this instance, I am required to calculate a sum for a claimant who has been convicted of a number of offences under the animal welfare legislation and subjected to the criticisms to be found in the District Judge's written decision. Those are simply background facts: they do not involve an attack by the Defendant upon this Claimant's character.

21. The relevance of "background context" in defamation has been recognised in such authorities as *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 and *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540, at [59]. Here, the background to the publication on 7 January 2014 is plainly relevant to the quantum of compensation: that is why it has been rehearsed already at some length.

22. At the same time, it is also relevant to have in mind the aggravating factors on which the first Claimant has relied. It is especially germane, for example, to bear in mind the wide republication of the words in other journals both in print and online. These do not constitute separate causes of action, but they can be taken into account as

aggravating the original publication. In all cases, however, it is necessary to confine one's attention to the "marginal" allegations to which I have already referred. In other words, I must focus on the republications referring to the deaths of the cattle having been caused by the first Claimant's neglect.

23. The offer was accepted on 19 May 2015 and thus the case should be regarded as having effectively been settled at that time. If the parties are unable to sort out matters such as the amount of compensation the court can assist in accordance with s.3(5) of the 1996 Act. The court must 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, and may reduce or increase the amount of compensation accordingly.

24. It is appropriate for the court on an application of this kind to arrive first at a figure that would represent fair compensation for the claimant. Then it is customary to acknowledge the use of the offer of amends procedure (in itself generally a significant mitigating factor) by allowing a discount from that basic figure: see e.g. *Milne v Express Newspapers Ltd* [2003] 1 WLR 927. If an early offer is made and accepted, and an agreed apology is published, there is bound to be substantial mitigation and the figure for compensation correspondingly reduced: *Nail v News Group Newspapers Ltd*, at [41]-[42], and *Turner v News Group Newspapers Ltd* at [81]. This will generally fall between 25% and 50% depending on the defendant's conduct, and in particular how promptly and readily the offer was made. The scale of these discounts has been criticised by some as disproportionate: see e.g. *Carter-Ruck on Libel and Privacy* (6th edn), at 13.31. But the underlying purpose was to encourage the use of the amends procedure and thus provide a relatively easy route to prompt vindication for deserving claimants.

25. Mr Birch placed great emphasis in his submissions upon the Defendant's apparent reluctance to publish what his client would regard as a meaningful withdrawal and apology. The wording of an apology was ultimately agreed in June of this year and then only published at the end of August. I have little doubt that the Defendant was indeed reluctant to go as far as the first Claimant wished because it clearly took a dim view of his failings with regard to animal welfare. That inevitably limits, therefore, the extent to which it can rely upon the apology by way of mitigating damage. It was also reluctant to take down the allegations from its website. When it originally amended the news release following the complaint, the reference to the deaths of the cattle was retained, although it no longer stated expressly that his "neglect led to the deaths of three cows". Instead, it said that he "neglected his cows at a Harrow farm, three of whom died". I can see that in practice this made little difference, since the deaths were irrelevant unless there was supposed to be some connection with the finding of neglect. It was only on 31 August 2016 that it was acknowledged, by way of clarification, that "… he was not charged with or convicted of any offence of causing the deaths of three cows". To what extent that would have mitigated the damage to his reputation is unclear. At all events, this delay does not in my view aggravate the original publication, but it does mean that there is little by way of mitigation to be gained from this grudging clarification. Mr Wolanski's suggestion of a 50% discount was, in these circumstances, optimistic to say the least.

26. Before I arrive at a figure to compensate for injury to reputation and distress (i.e. the equivalent of general damages), I should briefly refer to Mr Birch's valiant attempt to

advance a claim for special damages. The first problem is that no such claim was originally pleaded. (Rather unusually, there was an amendment to the particulars of claim after the offer of amends was accepted, but that could not affect the position so far as this Claimant is concerned.) Secondly, as Warby J pointed out, at [76], the extent of any impact on the restaurant business caused by republication of the news release cannot be assessed – let alone any impact attributable to the words complained of.

27. There was also some reliance placed on a lost contract worth £70,000, supposedly as a result of the publication, but again it would be impossible to establish a causal link to the words complained of specifically. There would be the same difficulty over losses said to have been incurred in relation to a vegan squatter on the land in Harrow, who became hostile and remained there in a caravan for six months by way of protest, following the publication of the news release, and caused damage of various kinds (estimated as amounting to at least £40,000). Not only would it be difficult to tie this in to the words complained of, but it would appear too remote in any event.

28. Various well known authorities were cited on the quantum of general damages but, since these cases all turned largely on their own facts, I did not find them of great assistance.

29. Bearing in mind the scale of the republications, and the length of time for which they remained accessible, I have decided that the right starting figure is a relatively modest £12,000. To take account of the offer of amends, made in April 2015, some three months after the claim was launched, and the desultory negotiations over the wording of an apology, I will allow 25% by way of discount. So the final figure for compensation is £9,000.