Case No: HQ10D00705

Neutral Citation Number: [2010] EWHC 895 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2010

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

SIMON BOWMAN **Claimant**

- and -

MGN LIMITED **Defendant**

- -
- -

David Sherborne (instructed by **Schillings**) for the **Claimant**
Alexandra Marzec (instructed by **MGN Legal Department**) for the **Defendant**

Hearing date: 29 March 2010

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Judgment

Mr Justice Eady :

1. In this litigation Mr Simon Bowman complains of an article published on a website by the Defendant, MGN Limited, the address of which is http://www.mirror.co.uk. There was no corresponding publication in the newspaper. The contents of the article, which may legitimately be characterised simply as gossip, were as follows:

> "**Hannah Waterman new man revealed as Les Miserables star Simon Bowman**
>
> Hannah Waterman is stepping out with ANOTHER actor since her split with former EastEnders and Strictly Come Dancing star Ricky Groves.
>
> Hannah, who lost around three stone last year, was snapped with a 'mystery man' just before she announced her split with Ricky.
>
> But we can reveal he is West End Star Simon Bowman, currently starring as the lead in Les Miserables – the world-famous musical that features I Dreamed A Dream, the song the launched the career of Susan Boyle.
>
> It's currently playing at Queens Theatre on Shaftesbury Avenue in London – just down the road from the Noel Coward Theatre where Hannah is starring in Calendar Girls.
>
> Before playing Jean ValJean in Les Miserables, Cardiff-born Simon also helped launch the original West End smash-hit musical Miss Saigon and played Raoul in The Phantom Of The Opera.
>
> He also played the part of young Elvis Presley in the stage presentation of Are You Lonesome Tonight with Martin Shaw playing the older Elvis, as pictured above in 1985.
>
> Simon has also just written a new musical with musician John Sinclair, formerly of Seventies rockers Uriah Heep.
>
> There has been no comment from his management as yet."

2. Prior to the issue of proceedings, the Defendant made an unqualified offer of amends pursuant to the statutory regime under ss.2-4 of the Defamation Act 1996. This was made on 13 January 2010 and accepted on 4 February.

3. The publication complained of was available online between 3.01 pm on 6 January 2010 and 6.25 pm on 7 January. It was then taken down in response to Mr Bowman's complaint. There was discussion about an apology and one appeared online on 12 January. It was in these terms:

> "**Simon Bowman – An Apology**

> On Wednesday 6 January we suggested that Simon Bowman was Hannah Waterman's new man following her split from her husband Ricky Groves. Simon is a family friend, he has been in a serious relationship with someone else for 20 years, and there is no romantic relationship between him and Hannah. We apologise to him for the distress and embarrassment caused by our suggestion to the contrary."

4. The parties have been unable to agree the amount of compensation to be paid to Mr Bowman and, therefore, pursuant to the provisions of s.3 of the Act, I am invited to make an assessment.

5. It is submitted by Ms Marzec, on the Defendant's behalf, that any defamatory meaning must arise by way of innuendo, since "stepping out" with Ms Waterman would not of itself be defamatory. The defamatory connotation arises from the extraneous fact that Mr Bowman has been in a long term relationship with his partner for some 20 years. The defamatory inference would thus be drawn only by those who read the article with an awareness of that relationship.

6. Ms Marzec suggests that the letter before action of 7 January 2010 did not spell out any defamatory meaning at all. It contained the following passage:

> " …
>
> The Article clearly suggests that our client is in a romantic relationship with Hannah Waterman. In fact, our client has been in a serious relationship with somebody else for twenty years and he and Ms Waterman are simply family friends. To claim, therefore, that our client and Ms Waterman are romantically linked is plainly defamatory of our client. This allegation has caused both our client and his partner considerable distress.
>
> … "

7. I would have thought that the sting of the libel for which Mr Bowman's advisers were contending was reasonably clear; that is to say, the allegation of disloyalty or "two-timing". Why else would there be included in the letter a reference to the 20-year relationship?

8. There is no evidence as to the number of readers who would have understood the article in a defamatory sense and, as Ms Marzec points out, the burden of proof in this respect lies squarely on Mr Bowman. He relies particularly upon the fact that the website in question is a popular one in this jurisdiction. He also gave evidence to the effect that his relationship is a matter widely known within the theatrical world and to his many fans, as well as among personal friends and relatives. On the other hand, it is reasonable to assume that the scale of publication would be much lower than in the case of a natural and ordinary defamatory meaning published in a national newspaper. In the absence of specific evidence, it would be right to take a conservative approach.

9. It is fundamentally important, in the context of this application, that the defamatory words were removed almost as soon as the complaint was received and were available on the Defendant's website for only 27 hours. I accept that the allegation may have spread and been repeated on other websites and that this is a legitimate factor for the court to take into account in assessing damages. I was reminded by Mr Sherborne, representing Mr Bowman, of the words of Bingham LJ (as he then was) in *Slipper v BBC* [1991] 1 QB 283, 300:

> "The law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs."

10. The principles to be applied on applications of this kind are familiar. In assessing the appropriate amount of compensation, the court should take the same approach as a judge or jury assessing damages in a libel trial. The court will take account of a similar range of factors, such as the gravity of the allegations, the scale of publication and any relevant aggravating or mitigating factors particular to the case: see e.g. *Abu v MGN Ltd* [2003] 1 WLR 2201 at [13].

11. In this particular case, Ms Marzec lays emphasis upon the importance of compensating the Claimant only in respect of injury or distress caused by the Defendant's publication. Just prior to that, a large photograph of him had been published in *The Sun* with Ms Waterman and, although he was not named in the article, it was obvious that a number of people were likely to recognise him. Although it is an artificial exercise, in some ways, it is important to remember that I should attempt to isolate those elements of damage caused to Mr Bowman by this Defendant and not heap upon it responsibility for other publications.

12. My attention was also drawn by Ms Marzec to the following paragraphs in the *Abu* case, cited above:

> "8. The Neill Committee recommendation was primarily directed towards providing a fair and reasonable exit route for defendants confronted with unreasonable demands from such manipulative or powerful claimants, who felt no doubt sometimes that they had them 'over a barrel'. Yet it was naturally hoped that the 'offer of amends' would help to focus minds on achieving realistic compromise, and thus reduce the cost, for a much wider range of litigants. Whether any such reform will succeed, however, must depend on whether the statutory provisions as drafted are attractive to use. In this instance, it must provide an incentive to defendants to make the offer and to claimants to accept. In either case, a rational decision can only be made if it is possible within reasonable limits to predict the range of outcomes to which one is committing oneself. For example, before making an

offer a defendant needs to be able to assess the gravity of the impact of the libel upon the complainant's reputation and feelings, and this will generally have to be done in the light of the particulars of claim and/or letter before action. It would not seem fair if an offer is made and accepted on one basis, and the complainant then reveals for the first time elements of pleadable damage not previously mentioned, such as for example that his marriage has broken down or that he has lost his employment.

9. It would only accord with most people's sense of justice if the offer of amends is construed as relating to the complaint *as notified*. Such an approach would also accord with the modern 'cards on the table' approach to litigation generally and, more specifically, with the thinking behind the Defamation Pre-Action Protocol."

13. A practice has developed as to how the court should tackle its task when required to assess the right figure for compensation in this statutory context and it has been approved by the Court of Appeal: see e.g. *Nail v News Group Newspapers Ltd* [2005] 1 All ER 1040 and *Turner v News Group Newspapers Ltd* [2006] 4 All ER 613. The settled practice is summarised in *Duncan & Neill on Defamation* (3rd edn) as follows:

"19.12 If the court determines compensation under the offer to make amends procedure, the assessment is on the same principles as in a defamation action. The usual principles on the elements of compensatory damages, mitigation, aggravation and causation apply; and there is no reason why exemplary and/or special damages should not be recoverable in an appropriate case. To determine the appropriate amount of compensation, the courts have adopted a two-stage process: first, to arrive at a figure which would have been awarded after trial (assuming no aggravation or mitigation of damages); secondly, to decide to what extent that figure should be discounted to give effect to any mitigation. The fact that the offer to make amends procedure has been adopted by the defendant is, of itself, a mitigating factor. Indeed, if an early offer to make amends is accepted and an agreed apology published, there is 'bound to be substantial mitigation'. There is, however, no standard percentage discount where the offer to make amends procedure is used; each case must be assessed on its own facts.

19.13 The assessment of damages under the offer to make amends procedure will, in general, be speedier than jury trial, but it will not be a 'rough and ready' process. Proper notice must be given of the matters

> relied on as affecting damages and, in an appropriate case, some disclosure may be necessary. In cases of grave allegations, where there had been a serious error, justice might require that 'significant time and money be spent in arriving at the right answer'. Awards of damages by judges under the offer to make amends procedure are likely to be much lower than jury awards after trial, but, nonetheless, may be substantial."

14. In the present case, the libel amounts to a bit of celebrity gossip, as I have already noted. As libel cases go, it is at the less serious end of the scale. I must not, however, discount the hurt which may be caused by a false allegation of adultery, even in the modern climate, or of disloyalty to a partner who is in a settled relationship that has not been formalised by marriage. In the celebrity world of media and entertainment, many take frequent changes of partner or "flings" as part of every day life, or so it would appear in "showbiz" coverage. But there is no doubt that this Claimant took the suggestion seriously and incurred embarrassment and some genuine distress. So, he said, did his (unidentified) partner. But she did not give evidence and I need to remember, in any event, that it is not part of my function to compensate her as though she were a claimant.

15. Nevertheless, the libel was short-lived and I am not aware of any hard evidence that Mr Bowman's reputation actually suffered in the sense that he was held in less esteem by any "right thinking members of society". The most significant element here is the Claimant's distress and hurt feelings. That is one of the traditional factors to be addressed in awarding libel damages – as also, where relevant, are injury to reputation and the need for vindication. In the present context of celebrity gossip, however, those other considerations would appear to loom less large. Mr Bowman gave the impression in evidence that his distress continues to this day. He may appear to some in this respect to be over-sensitive and to lack a sense of proportion. On the other hand, as Mr Sherborne reminded me, it is appropriate in defamation, as in other areas of the law, for a tortfeasor to "take his victim as he finds him": cf. *Cleese v Clark* [2004] EMLR 3 at [40].

16. It is important for judges to set out their reasoning and to identify the factors they have taken into account in arriving at any given result. I hope I have done so here. Yet, in the end, choosing the right bracket or figure for compensation must be largely a matter of impression and personal evaluation. Ms Marzec invited me to have in mind personal injury awards for pain, suffering and loss of amenity. It is now recognised that this is a legitimate consideration to take into account in paying regard to the value of money. She cited a number of recent county court awards measured in hundreds of pounds rather than thousands. Mr Sherborne described this comparison as "insulting", but it is nonetheless salutary to have in mind the temporary nature of the allegations and what must be regarded as the passing nature of their impact – even on this rather sensitive Claimant. It cannot be said to equate closely to physical pain or long term loss of amenity.

17. I have come to the conclusion, having regard to the methodology described in the passages from *Duncan & Neill* cited above, that an appropriate starting figure would be £8,500. I must next turn to the appropriate "discount" to recognise the deflationary or mitigating effect of the Defendant's conduct and, in particular, its early resort to the

offer of amends procedure. This would have signalled to Mr Bowman that he had effectively "won" from that moment onwards and his stress and anxiety should have been correspondingly reduced: see e.g. *Nail v News Group Newspapers Ltd*, cited above, at [19]. As against that, Mr Sherborne has highlighted two factors in particular. First, there is the modest size and placement of the apology. That, of course, is par for the course. Journalists hardly ever give an apology comparable prominence to that of the original offending words. The mitigating effect will thus be proportionately reduced. Secondly, there was a lack of co-operation in response to requests for information from Mr Bowman's solicitors prior to deciding whether or not to accept the Defendant's offer. The offer of amends regime is supposed to lead to a "cards on the table" approach and to prompt the parties to take a conciliatory approach. Here it was rather more a case of "take it or leave it".

18. In particular, there was little information forthcoming about a conversation which was alleged to have taken place prior to publication between a representative of Mr Bowman and the author of the article. It is said that Mr Bowman's denial of the rumours was ignored. There is a straight conflict of evidence on whether the conversation took place at all. Both of the relevant persons gave evidence before me in the witness box. It was flatly contradictory. I found it puzzling and difficult to resolve. I think it likely that there has been some misunderstanding. I cannot believe that either was lying about it. Since the burden of proof lies on Mr Bowman in this respect, I think I must conclude that he has failed to discharge it.

19. Mr Bowman wanted to rely on the conversation because he says that the fact that he was ignored added to his frustrations and hurt feelings. It could have had relevance in this context, but in the overall context it would not make very much difference. As it is, I shall ignore the point. It appeared to Ms Marzec at one stage that Mr Sherborne wished to allege malice on behalf of his client and that would be impermissible. As Ms Marzec put it, he would be having his cake and eating it; that is to say, his client would have accepted the offer of amends, with the peace of mind that brings, while at the same time seeking to allege that the Defendant's allegation had been made dishonestly – which would be enough to prevent the Defendant from relying on the offer of amends defence. But Mr Sherborne disavowed any such intent.

20. In all the circumstances, I will allow a discount of 50%. This is because of the early apology, the willingness to remove the offending words immediately and the very prompt reliance on the offer of amends regime. This means that the Claimant should recover £4,250.