Neutral Citation Number: [2007] EWCA Civ 600

Case No: A2/2006/2340

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon. Mr Justice Eady
HQ06X00790

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2007

Before :

LORD JUSTICE WALLER
Vice President of the Court of Appeal Civil Division
LORD JUSTICE KEENE
and
LORD JUSTICE DYSON

- -

Between :

Associated Newspapers Limited	**Appellant**
- and -	
Keith Burstein	**Respondent**

- -
- -

Victoria Sharp QC & Sarah Palin (instructed by **Messrs Foot Anstey**) for the **Appellant**
Jonathan Crystal (instructed by **Messrs Atkins**) for the **Respondent**

Hearing dates: Monday 21st May 2007

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Judgment

Lord Justice Keene:

1. This is an appeal by the publisher of the Evening Standard newspaper against a decision of Eady J dated 13 October 2006. That decision was to refuse summary judgment under CPR Part 24 sought by the defendant publisher in libel proceedings brought against it by the composer and co-librettist of an opera performed at the Edinburgh Festival. The opera, called Manifest Destiny, was the subject of a review by Veronica Lee in the Evening Standard on 15 August 2005. The review read as follows:

> "How horribly prescient; Keith Burstein's opera about suicide bombers receives its world premiere a few weeks after 7/7. What a pity it's such a trite affair. The heroine, Palestinian poet Leila (Bernadette Lord), leaves Daniel, a Jewish composer, to return to her homeland to become a suicide bomber. Her cell leader Mohammed falls in love with her, sees the error of his ways and, in order to save her, hands Leila over to the Americans. But it's all too much for her so she tops herself anyway.
>
> The libretto by Dic Edwards is horribly leaden and unmusical and the music uninspiring, save for the odd duet, and full marks to the talented cast of four for carrying it off. But I found the tone depressingly anti-American, and the idea that there is anything heroic about suicide bombers is, frankly, a grievous insult."

Both before Eady J and in this court the focus, certainly by the claimant, has been on the final passage in the review.

2. The alleged meanings set out in the Particulars of Claim at paragraph 4 are as follows:

> "(i) The Claimant is a sympathiser with terrorist causes and actively promotes such belief in his artistic work;
>
> (ii) The Claimant applauds the action of suicide bombers and raises them to a level of heroism."

3. In its defence the defendant denied that the words bore or were capable of bearing those meanings. It also pleaded that the words were fair comment on a matter of public interest. In his reply, the claimant averred that the review misdescribed the content of the opera (presumably an allegation that the facts set out were not substantially true) and reserved his position as to whether the view expressed was "genuinely held."

4. Eady J observed at paragraph 3 of his judgment that

> "… the claimant wishes to argue in effect that the message of the piece was that a grievous insult was offered by him; that the critic went beyond commenting on the content of the artistic

> work and incorporated an allegation about his standpoint, and in particular a sympathy on his part for suicide bombers."

The judge ruled that he could not hold that the words complained of were incapable of bearing the meanings pleaded by the claimant. He said this of those pleaded meanings:

> "They are hotly disputed, but it seems to me that they are meanings which the words are at least capable of bearing. I can understand that one point of view is that there was no more than a comment about the opera and the inference which the critic drew about the treatment of suicide bombers in the opera. A jury may ultimately agree with that interpretation of the words complained of. But the use of the word "insult" is arguably to attribute a motive to the author or to those responsible for putting the production before the audience."

5. Having made that ruling, he went on to find that it would not be perverse of a jury to conclude that the words complained of were a factual allegation. He also held that it would be open to a jury to conclude that one could not honestly hold the view that it glorified the act of suicide bombing or the behaviour of such bombers, though he suggested that that was unlikely. Indeed, in the final paragraph of his judgment he added this:

> "… this is classic fair comment territory and it is, in my view, very likely that a jury will ultimately hold that the defence of fair comment succeeds, but I cannot say that it is so clear that I can come to a conclusion at this stage of the kind that I am invited to arrive at."

He did, however, strike out the claimant's plea of malice.

6. Those rulings, insofar as they were adverse to the defendant and resulted in the judge declining to conclude that the claimant had no real prospect of succeeding on the claim, are now challenged by the defendant. The issues which arise are threefold. The first is whether this court should interfere with Eady J's ruling on meaning. The second is whether the words are capable of being held by a jury to amount to a statement of fact rather than of comment. The third is whether the words, if comment, are capable of meeting the other requirements for the defence of fair comment which arise in this case, namely whether the comment was based on facts themselves sufficiently true and was objectively "fair", that is to say it expressed a view which could honestly be held. Those requirements can be seen in the judgment of Lord Nicholls of Birkenhead in *Tse Wai Chun Paul v. Cheng* [2001] E.M.L.R. 777 at paragraphs 16 to 20, a decision of the Hong Kong Court of Final Appeal. A further requirement there set out, namely that the comment must be on a matter of public interest, was clearly satisfied in the present case, and does not give rise to any issue between the parties.

7. The order in which I have set out the three issues, beginning with that of meaning, does not accord with the defendant's approach on this appeal. Miss Sharp, Q.C., who appears on its behalf, argues that it is unnecessary to consider the issue of meaning

first and that one can begin by considering whether the words used were fact or comment. In support she refers to reported decisions where that appears to have happened, albeit not as a result of any expressed decision that that was the right course to follow. I cannot accept that approach. Where more than one meaning of words is in play in libel proceedings, it is necessary to know to which meaning any defence of fair comment is being alleged to apply. As Nicholls LJ (as he then was) indicated in *Control Risks Ltd v. New English Library Ltd* [1990] 1 WLR 183 at 189 A-D, there is a parallel to be drawn between what is necessary in respect of the defence of justification and what is necessary where the defence of fair comment is raised. He noted that where justification is pleaded, a defendant was required to spell out the meaning of the words which he would seek to justify – the "Lucas-Box" particulars. Nicholls LJ went on to say at page 189 C – D:

> "In my view by parity of reasoning, when fair comment is pleaded the defendant must spell out, with sufficient precision to enable the plaintiff to know what case he has to meet, what is the comment which the defendant will seek to say attracts the fair comment defence."

8. This has given rise to the requirement in CPR 53 PD 2.6 that a defendant must specify the defamatory meaning he seeks to defend as fair comment. In the same way in the recent case of *Lowe v. Associated Newspapers Limited* [2006] EWHC 320; [2006] 3 All ER 357, Eady J at paragraph 15 of his judgment referred to the defence of fair comment and observed:

> "As with any other defence, the first step is to identify the meaning of the words and then to consider whether the defence of fair comment has been made out."

In fact, the defence pleaded in the present case put forward no alternative meaning of the words used in the review of the opera. It merely denied that they bore or were capable of bearing the meanings set out in the Particulars of Claim. It then went on to raise a defence of fair comment in respect of "the said words".

9. It seems clear that the defendant's position is that, first, the words used are not capable of bearing the alleged meanings and, secondly, if they were, they were nonetheless still fair comment. In any event Mr Crystal, who appears on behalf of the claimant, accepts that, if the words used in the review are not capable of bearing one or other of the meanings set out in the Particulars of Claim, he must lose and the claim be summarily dismissed. He puts forward no other defamatory meaning. Consequently it makes good sense to deal with the issue of meaning first.

Meaning

10. It is well-established that the test here to be applied is what the words would convey to the ordinary reader: *Lewis v. Daily Telegraph* [1964] A.C. 234. That is first and foremost a matter for a jury. The judge's role is confined to deciding whether the words used are capable of bearing the meaning or meanings contended for and, if so, whether any of those meanings is legally capable of being defamatory. That has to be determined in the temporal context in which the words were used, and Mr Crystal

makes the point that in the present case the words were used in a review published only a few weeks after the London bombings on 7 July 2005.

11. The role of an appellate court is yet more confined than that of the first instance judge. It has been emphasised a number of times that this court will be slow to interfere with an interlocutory ruling on meaning by a first-instance judge, though this approach of judicial self-denial will be somewhat more relaxed where the judge has "erred on the side of unnecessary restriction of meaning", as it was put in *Berezovsky v. Forbes Inc*. [2002] EWCA Civ 1251; [2001] EMLR 45 at paragraph 16. However, such self-denial cannot mean that this court will never intervene even where the judge has adopted a generous approach to meaning. As was said in *Berezovsky*, at paragraph 14:

> "there is no defensible way in which the courts can adjust the meaning so as to include things which no sensible reading of the words could embrace."

12. The topic was re-visited by this court in *Patterson v. ICN Photonics Limited* [2003] EWCA Civ 343, where it was said that the established principles

> "do not, however, prevent this court from intervening in an appropriate case, where it is satisfied that the judge has clearly gone wrong as a matter of approach or has reached a conclusion which is patently unsustainable." (paragraph 17)

It was there emphasised that no self-denying ordinance can absolve this court from its responsibility to act where it is satisfied that it should intervene, even where the ruling below has been an "inclusive" one: paragraph 18.

13. It is unnecessary to set out in detail the principles to be applied in ascertaining whether the words in question are capable of bearing a defamatory meaning. They are well known and were helpfully summarised by Neill LJ in *Gillick v. British Broadcasting Corporation* [1996] E.M.L.R. 267 at page 272. First and foremost, as I have already indicated, one seeks to apply the natural and ordinary meaning which the words would have conveyed to the ordinary reasonable reader. As Lord Morris of Borth-y-Gest said in *Jones v. Skelton* [1963] 1 WLR 1362, 1370 in what is now a classic passage:

> "In deciding whether words are capable of conveying a defamatory meaning, the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation."

14. Miss Sharp relies upon that passage and submits that the pleaded defamatory meanings, ascribing as they do the alleged theme of the opera to the author and composer as representing his personal views on terrorism and suicide bombers, fall outside the range of reasonable meanings. She argues that, while the review does suggest that the opera presents suicide bombers as having something heroic about them, it is an unjustified leap to read the review as meaning that the author sympathises with terrorists. It is simply illogical to infer that an author espouses a view expressed in a work of fiction he has created. For his part, Mr Crystal contends

that the use of the words "the idea" in the final sentence of the review points to the author, because only people have ideas, just as only people "insult". The review associates "the idea" with the author. At the very least, it is argued, Eady J cannot be regarded as plainly wrong on this issue.

15. I do not find Mr Crystal's arguments persuasive. The use of the phrase "the idea" does not point towards the author but to the content of the opera, as Dyson LJ pointed out in argument. The judge's reasoning on meaning is very brief, as must often be the case, since any judge must take account of the impression the words had on him and that may not be capable of great elaboration. But what seems to have influenced him was the use of the word "insult", which he said was "arguably to attribute a motive to the author." I regret that I cannot concur with that. The theme of an opera or play may be described as insulting, without implying any motive or viewpoint held by the author.

16. The test is whether the words are capable of bearing the meanings pleaded. It seems to me that the first of those pleaded in paragraph 4 of the Particulars of Claim, namely that:

> "the Claimant is a sympathiser with terrorist causes and actively promotes such belief in his artistic work"

could not be attached to the words used in the review by any reasonable jury. Even taken in isolation, the final sentence simply is incapable of being so interpreted, but that sentence has to be read in context, and part of that context is the earlier sentence referring to Mohammed seeing "the error of his ways." It would be a very strained interpretation to read this review as meaning that the claimant was a terrorist sympathiser and I would reject such a meaning.

17. The other pleaded meaning, to be found at paragraph 4(ii), is that "the claimant applauds the action of suicide bombers and raises them to a level of heroism." I was at one stage of the view that this too fell outside the range of meanings which the words are capable of bearing, since once again it seeks to regard the content of the opera as reflecting a particular viewpoint of the author. But, on reflection and adopting a properly restrained approach, I have concluded that the words are just capable of such a meaning if it is given a somewhat restricted interpretation, to the effect that *in this opera* the claimant applauds the action of suicide bombers and raises them to a level of heroism. That could still be seen as defamatory of the claimant.

Comment or Fact?

18. The issue which then arises is whether with such a meaning the words are capable of being a statement of fact or conversely are only capable of being seen as comment. This is an issue properly to be dealt with judicially: *Turner v. MGM Pictures Ltd* [1950] 1 All ER 449 at 461. If they are only capable of being construed as comment, there is then the issue of whether the other requirements for the defence of fair comment are met. There the dispute is principally as to whether the view expressed was one which could honestly be held.

19. The defendant submits that the judge was plainly wrong in ruling that the words used were capable of being seen as a statement of fact. Miss Sharp contends that the words contain a strong element of value judgment and she relies upon the often-quoted statement of Cussen J in *Clarke v. Norton* [1910] VLR 494 at 499, approved by the Court of Appeal in *Branson v. Bower (No. 1)* [2001] EWCA Civ 791 at paragraph 12:

> "More accurately it has been said that the sense of comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc."

20. Here, the words were contained in a press article which was obviously a review by a critic expressing the subjective views of the writer. It is argued that the reader would approach the article on that basis. The words in the final sentence now complained of were clearly based on the earlier statements in the article about the opera, with no suggestion that the writer had any extrinsic information about the author. In that connection, reliance is placed on the early King's Bench decision in *Carr v. Hood*, referred to in *Tabart v. Tipper* [1808] 1 Camp. 354, where Lord Ellenborough held that

> "it is not libellous to ridicule a literary composition, or the author of it, in so far as he has embodied himself with his work …
>
> Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libellous: but no passage of this sort has been produced; and even the caricature does not effect the plaintiff, except as the author of the book which is ridiculed."

That, submits Miss Sharp, underlines the importance of the fact that any attack on the author (if there was one) is based solely on the work in question.

21. For the claimant, Mr Crystal argues that the final sentence in the review could properly be seen by a jury as a factual allegation and that they would not be perverse if they so concluded. The judge has arrived at that conclusion and this court should not interfere.

22. For my part I am quite satisfied that Miss Sharp is right on this issue. Insofar as the final sentence in the review might be said to be capable of being read as a statement of fact, it was patently intended as a summary of and a commentary on the factual description of the opera set out in the preceding part of the review. No reasonable person could read it as a statement about the claimant in respect of any matter not contained in that review. There is no suggestion that the reviewer was otherwise acquainted with the claimant. That is important for the reasons set out in *Carr v. Hood* (ante), which was cited with approval by Somervell LJ in the Court of Appeal

in *Kemsley v. Foot* [1951] 2 KB 34 at 41. The final sentence in the review was patently drawing an inference from the facts which had been set out earlier in the review, and on the principles approved by the House of Lords in *Kemsley v. Foot* [1952] A.C. 345 it was unmistakeably comment. The point was vividly put by Lord Ackner in *Telnikoff v. Matusevitch* [1992] 2 A.C. 343 at 358 B, adopting a passage from *Winfield and Jolowicz on Tort*, 11th edition:

> "To say that 'A is a disgrace to human nature' is an allegation of fact, but if the words were 'A murdered his father and is therefore a disgrace to human nature' the latter words are plainly a comment on the former."

Such is the situation in the present case.

23. Moreover, the words complained of were contained in a review by a critic, as any reader would appreciate, and which the reader would expect to contain a subjective commentary by the critic. The words also embody, quite obviously, powerful elements of value judgments – the word "heroic" in itself does that. In addition, the final sentence follows other sentences full of evaluative words, such as "trite", "horribly leaden" and "uninspiring". That too must be understood to influence how a reasonable reader would see the final sentence. Such value judgments are not something which a writer should be required to prove are objectively valid, as the Strasbourg Court has pointed out when dealing with Article 10 rights in *Nilsen and Johnson v. Norway* (2000) 30 EHRR 878 at paragraph 50.

24. It may be, as the judge here said, that a jury might regard the words complained of as attributing a "motive" to the author. That, however, cannot suffice to take the case out of the category of comment, when any such "motive" could only be an inference drawn from the factual material set out earlier in the article. That, as this court stressed in *Branson v. Bower (No. 1)* at paragraph 13, indicates that the words amount only to the writer's opinion and no more. In the *Branson* case Latham LJ cited with apparent approval a passage from the judgment of Eady J in the court below where the judge had said:

> "if a journalist makes inferences as to someone's motives, that may be treated as the expression of an opinion even though the inference drawn may be to the effect that there exists a certain state of affairs (including a state of mind)."

I agree with that proposition. It does not, of course, mean that a jury might not properly in some cases conclude that the statement was one of fact, but it demonstrates that it is not enough that the inference is as to a person's motives – the words may still be comment, and for the reasons I have given earlier I am firmly of the view that the words complained of in the present case, when seen in context, carry an unmistakable badge of comment.

25. I conclude, therefore, that the words are plainly comment and that no reasonable jury could treat them as a statement of fact.

Was the Comment "Fair"?

26. The first of the two remaining elements in the defence of fair comment, namely whether the comment was based on facts which were themselves sufficiently true, can be dealt with shortly. Neither in writing nor orally did Mr Crystal point to any factual inaccuracies in the earlier part of the review which sought to summarise the events portrayed in the opera. The remaining requirement is whether the comment was objectively "fair", that is to say, was an opinion which an honest person could hold. That does not require the court to ask whether it was a reasonable opinion or one which a reasonable person could hold. It may be an exaggerated opinion or a prejudiced one, so long as it can be honestly held. The law protects the frank expression of views on matters of public interest, so long as they are not actuated by "malice" in the sense used in the jurisprudence of defamation. As Lord Nicholls said in the *Tse Wai Chun Paul* case at paragraph 20:

> "a critic need not be mealy–mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism."

27. Could the opinions expressed in this review be honestly held by someone who had seen the opera? That question can only be answered by acquainting oneself with the opera, which I have done by viewing a DVD of it and by reading the libretto. It is plainly anti-American, as the review states. I say that, not to approve or disapprove of such an approach but merely to state a fact, at least in so far as American policy towards the Middle East is concerned. The opera is undoubtedly dealing with controversial issues, and it could be expected to arouse different responses, including quite vehement ones, in those who saw and heard it. In short, it deals with matters upon which strong opinions could legitimately be held and, more to the point, upon which any jury would expect strong opinions to be held without any scintilla of dishonesty on the part of those hold them.

28. It may be that there is a degree of over-simplification in what is quite a short review but there is certainly adequate material in the opera for a critic to form an honest view of the kind expressed by Miss Lee and about which complaint is now made. The facts about the opera do not require the judgment of a jury in order to establish what they are: they are contained within the work itself. Nothing Mr Crystal has pointed to forms any basis for concluding that it would be open to a jury to find that the opinions in the review could not have been honestly held by a person who had seen the opera. I am satisfied that this final element in the defence of fair comment is made out.

29. It is unusual for this court to overturn a judge who has ruled that a defence of fair comment may not succeed and that the matter should be left to a jury to determine. These matters are generally for a jury to decide, so long as it is properly open to them as a matter of law to decide one way or the other. But if this court is firmly of the view that only one answer is available to any reasonable jury and that the defence of fair comment must succeed, then it is the court's duty so to rule. Anything else would not be judicial self-restraint but an abdication of judicial responsibility. As will be apparent, I have concluded that the words complained of do amount to fair comment on a matter of public interest and that they are not capable of being held to fall outside the scope of that defence. The judge below struck out the claimant's allegation of malice. It follows that the defence of fair comment is bound to succeed and

consequently, for my part, I would allow the appeal and order summary judgment in favour of the defendant.

Lord Justice Dyson:

30. I agree.

Lord Justice Waller:

31. I also agree.