Case No: HQ03 X000825

Neutral Citation Number [2003] EWHC 2991 (QB)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10TH December 2003

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

BRIAN PADDICK	**Claimant**
- and -	
ASSOCIATED NEWSPAPERS LTD	**Defendant**

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- -

Desmond Browne QC and **Matthew Nicklin** (instructed by Bindman & Partners) for the Claimant
Anthony Hudson (instructed by Olswang) for the Defendant

Hearing dates: 4th December 2003

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Judgment

Mr Justice Tugendhat :

1. There are two applications before the court in this action. One is that the Claimant should supply a copy to the Defendant of the whole of two witness statements of which extracts have been supplied. The other is that the Defendant should pay the costs of an application relating to the provision of transcripts of interviews, the audio tapes of which have already been disclosed.

The action

2. In this action the claimant, a senior police officer, claims damages and an injunction in respect of the disclosure of information about himself which he claims to be private and confidential. On 17 and 24 March 2002 the Defendants published long articles about the Claimant in the *Mail on Sunday*. Much of the information relates to intimate details of his relationships with James Renolleau, with whom he had lived for some time, and with Fiona Chambers, who had been his fiancée. Other topics covered include intimate details of other relationships, matters of health and his beliefs and opinions on matters of religion and politics.

3. The Claimant does not complain in this action of all the information that has been published. In relation to the matters of which he does complain, his case is that his right to respect for his private life has been infringed regardless of the truth or falsity of the statements concerned.

4. The Defence raises a large number of points, which I summarise as follows. There is no cause of action other than libel for the publication of false allegations, and no confidence in invented allegations. The information is trivial, in the public domain or similar to information, which is in the public domain, corrective of information, which the Claimant has put into the public domain, a matter of public interest, or one or more of these and other things.

5. The Defence also pleads, in para 11, that 'the Defendant will rely on the passages of which the Claimant did not complain in the issue of *The Mail on Sunday* for 17th March 2002 (being therefore matters which the Claimant implicitly accepts are not private and which can properly be the subject of public debated and examination)'. Two such topics are an allegation about smoking cannabis and another about Mr Renolleau having been on bail when he and the Claimant began their relationship. The plea then continues that 'the public had a strong and legitimate interest in information germane to discussion or debate of' the information the publication of which the Claimant does not complain'.

6. In his Reply para 14 the Claimant states that he 'does not accept that his decision not to complain of certain passages in the two articles either means that he accepts that they are accurate or that they are properly a matter for public debate and/or examination'. He requires the Defendant to prove all facts – in particular those advanced in paras 11 and 12 – which it will suggest are relevant to its claim that publication of the words complained of was justified in the public interest.

7. The Claimant asked for further information of paras 11 and 12 of the Defence, including whether the Defendant says that the allegations are true. In response to that request the Defendant pleads:

> 'The information published in the Articles (including that obtained from James Renolleau and Fiona Chambers) was ostensibly credible. In relation to any balancing exercise by the Court as between any right to privacy/confidence and the right to freedom of expression and/or the public interest the Defendant will rely on the Claimant's considered decision not to seek any vindication at law for any of the defamatory allegations …'

8. The position of the Defendant has been restated clearly before me. It makes no positive case that the information relied on is true. It is the Defendant's case that the information was ostensibly credible. Mr Hudson, who appeared for the Defendant, did not enlarge on the source of this phrase, or upon the legal basis for the stance the phrase represents. I understand it to be related to the question of the degree of proof necessary to establish a defence of public interest. That point has been considered by the courts in the *Spycatcher* litigation, *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. In that case, at p283 Lord Goff said:

> '…a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source'.

Similar observations have been made in relation to the public interest defence in libel, that is qualified privilege, in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

9. The Claimant does not accept that the information provided by Mr Renolleau and Ms Chambers was 'ostensibly credible'. He addresses the point in his witness statement dated 28 November 2003, at para 33. There he says that he has listened to the tapes of the journalist's interview with Mr Renolleau, and Mr Renolleau 'contradicts himself and lies'. That is a comment on the tape, not on the underlying facts. But he also goes on, in that and numerous other paragraphs, to assert that statements made by Mr Renolleau are false, and that they were not subsequently substantiated in the criminal and disciplinary investigations of himself which followed the publications complained of.

10. For this reason, Mr Hudson submits that the question of the truth or falsity of Mr Renolleau's allegations has now become an issue in the action, or part of the Claimant's case (in the language of CPR Part 31.6), although on the pleadings neither party alleges that any allegation is either true or false.

11. I do not accept this submission. The case of each party for the purposes of standard disclosure under CPR Part 31 is to be found in that party's pleadings. I am not asked today to rule upon what can or cannot be included in the evidence in chief to be given at trial by the Claimant or any other witness. I do not find it surprising that the Claimant`s witness statement should contain assertions that the information in paras 11 and 12 of the Defence is false, or

that he should contradict the implicit acceptance point made in para 11. For example, in a libel action where the only defence is qualified privilege, the claimant will commonly include in his evidence in chief an assertion that the words complained of are false. Of course, as Mr Hudson points out, a libel claimant benefits from the presumption of falsity, but the fact that such averments are included in his witness statement has not been held to make truth or falsity a part of his case in any libel action so as to trigger an obligation to give disclosure.

12. In giving disclosure the Claimant listed two documents, numbered 126 and 128, which post-date the publication of the words complained of. They are described as 'extract from witness statement of JYH Renolleau' and 'extract from statement of Brian Paddick to Police Authority'. The extracts that are disclosed are passages of the statements which relate to conversations which Mr Renolleau had with the Claimant before publication, and in particular, to what Mr Renolleau told Mr Paddick that he, Mr Renolleau, was going to say to the Defendant. According to the Claimant what Mr Renolleau said was 'he would call the newspaper and tell them that he was not prepared to substantiate the cannabis allegations but would sign the deal so that he collect his money'. Mr Renolleau's statement gives a different account of what he said he would do with regard to the press.

13. Asked to disclose the whole of the documents from which the disclosed passages are extracts, solicitors for the Claimant explained why they would not. In letters dated 30 September and 13 November 2003 they say that he has disclosed all matters in the statements which relate to the matters in issue. They say that the issue of truth or falsity of the cannabis allegation is not in dispute because it is the Defendant's case only that the information was 'ostensibly credible'. They add 'This means that documents relating to the period after publication do not go to any pleaded issue'.

14. Mr Browne QC has maintained and elaborated on that stance before me. He says that the undisclosed parts of the documents are irrelevant, and that a party's statement as to the relevance of documents is conclusive.

15. For the second of these propositions he relies on *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172. Hoffmann LJ (as he then was) said at p 174-5 that it has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant, and went on, in a passage with which Leggatt LJ agreed:

> 'The oath of the party giving discovery is conclusive, "unless the court can be satisfied - not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case - that the affidavit does not truly state that which it ought to state:" *per* Cotton L.J. in *Jones v. Andrews* (1888) 58 L.T. 601, 604 …. In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant'.

16. For 'affidavit' in that citation, it would now be necessary to substitute 'disclosure statement'.

17. For the first proposition, namely irrelevance, Mr Browne QC relied on *Loutchansky v Times Newspapers Ltd* [2002] QB 321. In that case the defendant newspaper was attempting to rely upon *Reynolds* qualified privilege, but to do so by reference to matters not known to them at the time of publication. The argument failed. Brooke LJ said at [41]:

> 'Mr Browne observed, in effect, that, if Mr Spearman's contention was right, a wealthy newspaper, after complaint was made, could go out to scour the highways and byways in search of material which it might then call in aid to justify retrospectively its decision to publish untrue defamatory matter. If it found material which seemed to provide that retrospective justification it would add it to its defence. If it found material which appeared to point the other way, it would be entitled to claim that this material in its hands was privileged from production, however extensive and persuasive it might be. This appears to me to be an odd way of setting out to prove that, at the time the decision to publish was made, all the circumstances surrounding that publication, including the matters known to the publisher, justified publication in the sense that there was at that time a duty to publish and a correlative interest in the public in receiving the information published. I agree with Smith J that the factors relating to the conduct and decisions of the publisher or journalist are to be considered objectively in the light of the matters known to them at the time and are not to be judged with the benefit of hindsight.'

18. Sir Martin Nourse said at [87]-[88]:

> '87. In *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* 28 July 2000 Smith J said, at paragraph 50, in relation to the ten matters or factors referred to by Lord Nicholls of Birkenhead in *Reynolds v Times Newspapers* Ltd [2001] 2 AC 127, 205: "Some factors relate to the quality, status and importance of the material. Others relate to the conduct and decisions of the publisher or journalist concerned. The factors are to be construed objectively in the light of the matters known to the publisher or journalist at the time. In so far as a journalist's conduct and his decision to publish come under scrutiny, he or she should not be judged with the benefit of hindsight."
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> 88. I entirely agree with those observations. If a defendant acts on the basis of facts which he honestly and reasonably believes to be true, but which are later found to have been, through no fault of his own, untrue, he will not be deprived of his defence. Equally, facts which are unknown to him at the time of publication cannot have any bearing on the question whether he is under the requisite duty at that time.'

19. Mr Hudson points to *Campbell v MGN* [2003] QB 633 [59]-[62] where the court considered an analogy Mr Browne QC sought to draw between qualified privilege and confidentiality or privacy in order to rely on the latitude that is given to a defendant on an occasion of qualified privilege to publish matter peripheral to that which is necessary to protect the interest or discharge the duty which is the foundation of the privilege. The analogy was rejected in that context. It does not seem to me to follow that it should be rejected in all contexts. In qualified privilege the public interest asserted is a public interest in disclosing information which is or may be false. That is similar to the public interest asserted in the present case.

20. In other confidentiality cases the public interest asserted is in disclosing information which is admitted, or can be proved, to be true. That may give rise to considerations which are not analogous to a defence of qualified privilege. Truth is itself a defence in libel. There is no need to prove any additional public interest in publishing the truth.

21. I accept Mr Browne QC's submissions. At one point the Defendant had contended that whatever the merits, the Claimant was precluded from opposing the disclosure by the form of the list they had served. Before me the Defendant made clear that no reliance was now being placed on that argument.

22. For these reasons the Defendant's application fails.

The costs of the transcripts

23. The revelations of Mr Renolleau were recorded, and the recordings have been disclosed. Apparently they are very poor and difficult to understand, at least in parts. Whether what Mr Renolleau said was ostensibly credible could depend very much on what he is recorded as saying. Obviously the journalist who was taking part in the conversation and made contemporaneous notes is likely to be in a better position than a third party to interpret what is recorded.

24. Accordingly, by notice dated 19 November 2003 the Claimant sought an order under the Court's general case management powers in CPR3(1)(m) that the Defendant supply a complete transcript of tapes disclosed in its disclosure lists. The grounds for the application are: 'The tapes are crucial to the just resolution of the claim and it has proved impossible to have these transcribed without the assistance of those involved in the conversations. The Defendant's journalists are featured on the tape and made their own notes of the conversations and need to be involved in the process.'

25. By letter dated 2 December 2003 the Defendants agreed to do this, and before me they agreed to be subject to an order that they do so by 31 December 2003. So the argument is only about the costs of the application.

26. I have been taken through the correspondence and the skeleton arguments, but not asked to resolve the merits of the dispute. I would not have found the answer obvious.

27. The definition of a document in CPR31.4 is 'anything in which information of any description is recorded'. Given the width of that definition, it might have been expected that the obligation to give disclosure would be expressly stated to be to give it in an intelligible form (compare the obligation under the Data Protection Act 1998 s.7(1)(c) and 8(2)). A document may be in an unintelligible form for many reasons, not necessarily related to technology. It may be a document written by hand which the disclosing party can read but the other party cannot. It may be that some other information is necessary to interpret the disclosed document, such as a key to some abbreviations.

28. Neither counsel has been able to find any authority directly in point. Mr Browne QC relies on the equality of arms principle and *Maltez v Lewis* unreported Neuberger J, 27 April 1999. Mr Hudson relies on note 31.15.1 of the White Book, citing *Bayer v Harris Pharmaceuticals* Ltd [1991 FSR 170. to the effect that the disclosing party does not have to provide a translation of

documents in a foreign language. That seems to me to be rather different, although I have not in fact been asked to read either authority.

29. It seems to me that I would have to resolve the underlying issue to reach a firm conclusion on the question of costs. I cannot do that. On balance it seems to me that the merits of the Claimant's position are greater than those of the Defendant's. Doing the best I can without resolving the issue of principle I order that the Claimant's costs be in the case.