Neutral Citation Number: [2012] EWHC 1946 (QB)

Case No: HQ12D00280

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Robin Tilbrook	**Claimant**
- and -	
Stuart Parr	**Defendant**

- -
- -

The Claimant appeared in person
Jonathan Scherbel-Ball (instructed by **Hemingways Solicitors Ltd**) for the **Defendant**

Hearing dates: 10 July 2010

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Judgment

Mr Justice Tugendhat :

1. This is an action for defamation and malicious falsehood commenced by a claim form issued on 25 January 2012. The Claimant is the chairman of a political party, the English Democrats. He is also a solicitor. The Defendant is sued as the author of an internet publication in the form of a blog known as "Bloggers4UKIP". As is common knowledge, UKIP stands for the United Kingdom Independence Party, which is another political party.

2. The words complained of were published on and after 28 November 2011 under the heading "BNP Butler joined BNP Barnbrook in the English Democrats". There then follow about a dozen lines of text. These are alleged to be untrue (the Claimant states that Mr Barnbrook has never been a member of the English Democrats), but it is not pleaded that those words of themselves are defamatory. The words that are complained of as defamatory are in the one line at the end of the text. The words complained of include:

> "Eddy Butler the former National Front, former BNP, former Freedom Party, former BNP a couple more times, former BNP national elections co-ordinator has joined the English Democrats.
> The announcement which was the EDP's worse kept secret

> since his mate Richard Barnbrook joined in January, will be a bitter blow to the handful of party activists that haven't yet joined UKIP who had hoped to stop the BNP takeover of the party…
>
> English Democrats: not left, not right, just racist".

3. The Defendant has issued an application for an order that the claim be struck out, or that summary judgment be entered for the Defendant. The main issue before the court in this application is whether the words complained of are capable of being understood as referring to the Claimant. The Claimant is not named. Nor do the Particulars of Claim set out any facts relied on which might be known to any particular publishees, and no publishees are identified. The only fact set out in the Particulars of Claim relevant to the issue of whether the words complained of are capable of referring to the Claimant is the fact that he is the chairman of the English Democrats.

4. At the end of the argument I stated my conclusion that the words complained or are not capable of referring to the Claimant. These are the reasons for that conclusion.

5. The submissions of Mr Scherbel-Ball for the Defendant are as follows.

6. It is settled law that the words cannot be defamatory of a claimant unless they are capable of being understood by a reasonable reader as referring to the claimant. In *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1252 D-1253F Lord Morris said at p 1253D:

> "The principle was succinctly expressed by Viscount Simon LC in his speech in *Knupffer v. London Express Newspaper Limited* [1944] AC 116 when he said that, at p119,
>
> > 'where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to*'*.

7. In *Knupffer* the plaintiff was the representative in Great Britain of a political party of Russian émigrés known as Mlado Russ or Young Russia. The total membership was about 2000 and the membership of the British branch was twenty four. The words complained of included:

> "The quislings on whom Hitler flatters himself he can build a pro-German movement within the Soviet Union are an émigré group called Mlado Russ or Young Russia. They are a minute body professing a pure Fascist ideology…"

8. The plaintiff relied on his own prominence or representative character in the movement as establishing that the words referred to himself (see page 120). The appeal to the House of Lords followed a trial, at which he had succeeded, and an appeal by the defendant to the Court of Appeal where the plaintiff had lost. In

dismissing the plaintiff's appeal to the House of Lords Viscount Simon LC said at p122:

> "In the present case the statement complained of is not made concerning a particular individual, whether named or unnamed, but concerning a group of people spread over several countries and including considerable numbers. No facts were proved in evidence which could identify the plaintiff as the person individually referred to. Witnesses called for the Appellant were asked the carefully framed question, "To whom did your" mind go when you read that article?", and they not unnaturally replied by pointing to the Appellant himself. But that is because they happened to know the Appellant as the leading member of the Society in this country, and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual."

9. The question for the court at this stage is not whether the words complained of would be understood to refer to the Claimant, but whether they are reasonably capable of being so understood. Since the legal test as to whether words could be understood as referring to a claimant is essentially the same as the test to be applied where the question is whether the words complained of have a particular meaning, it is appropriate to set out that test. It has been most recently formulated by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at paras 14 and 15, as follows, so far as is relevant to this action:

> "The legal principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) ... (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" … (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense".

10. The policy of the common law has long been to give effect to the right of freedom of expression. In recent decades the courts have become accustomed to referring specifically to that right as it is enshrined in the Convention. Thus in *Derbyshire CC v. Times Newspapers Limited* [1993] AC 534 at page 547 Lord Keith said:

> "It is of the highest possible importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech".

11. Lord Keith went on to quote from the words of Lord Bridge of Harwich in *Hector v. Attorney General of Antigua and Barbuda* [1990] AC 312 at page 318, where he said:

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle such criticism amounts to political censorship of the most insidious and objectionable kind. "

12. In *Goldsmith v. Bhoyrul* [1998] QB 459 Buckley J stated that that principle must apply equally to a democratically electable political party.

13. Although the Claimant is a solicitor, he has not prepared a skeleton argument or referred the court to any authorities or legal texts. He relies on the fact that he is the Chairman of the English Democrats as sufficient for a reasonable reader to understand the words complained to refer to him.

14. The Defendant has submitted two witness statements in support of his application. Except in so far as there are exhibited the words complained of in their context (that is a print out) and the letter before action, these do not assist the court on the issue of whether the words complained of are capable of referring to the Claimant. That case has been advanced only by reference to the pleading itself and the law.

15. In his witness statement in response the Claimant says this about himself and his Party:

> "3. I am also the chairman and one of the founder members of the English Democrats Party, which is a party whose primary purpose is to campaign for a Parliament, First Minister and Government for England with at least the same powers as the Scottish ones within a federal UK. The party is expressly open to people of all background, ethnicity, etc., who share our aims and indeed we have stood quite a few candidates who are not ethnically English, not only people of Scottish, Welsh and Irish extraction, but also Jewish, Sikh, and Kashmiri and Muslim.
>
> 4. I mention about the English Democrats Party because we are an avowedly a non-racist party. I appreciate that I could not bring this claim on behalf of the Party…
>
> 8. Although most of his attacks on me have been incorrect and misguided, I have become increasingly conscious that he has been attempting to smear my personal reputation and I consider that he has done so in this case. He has also done so from the

> ignoble motive of seeking to obtain improper advantage for his Party. To me the allegation that the English Democrats (and therefore I am) are 'just racist' is simply one too many dishonest smears by this Defendant. …"

16. In my judgment this case is indistinguishable from *Knupffer*. On one view it may be a stronger case than *Knupffer*. In *Knupffer* no individual was referred to by name. But in the present case the words complained of do identify two individuals, both connected to the BNP, who are said to have joined the English Democrats. The reader might be thought more likely to understand that it is these individuals who are the targets of the allegation of racism, rather than the Claimant. But whether that is so or not, as the editors of Gatley on Libel and Slander 11th Edition at para 7.9 observe, there is a risk that discussion of matters of public concern may be inhibited if the law is too ready to hold that an individual is identified by an attack on a group in which the individual is not named.

17. The difficulty in the Claimant's case is illustrated by his own letter before action in the present case, since that makes clear that all other publicly identified officers and members of the English Democrats Party would be entitled to sue, if the Claimant is entitled to sue. It includes the following:

> "5. The Issue
>
> In your blog you have regularly personally identified the Claimant who is the Chairman of the English Democrats, and in this blog entry have falsely and maliciously claimed that the English Democrats and by necessary implication the Claimant are 'racist'.
>
> By extension the same is true of all other publicly identified officers of the English Democrats…
>
> 8. The Details of Any Interested Parties
>
> All other publicly identified officers and members of the English Democrats…".

18. That conclusion disposes of the claim in malicious falsehood as well as the claim in defamation, since both depend upon the Claimant establishing that the words complained of are reasonably capable of referring to him.

19. In the course of submissions the Claimant indicated that he might wish to rely upon other publications of the Defendant in which he is named. I indicated that if, on consideration of this judgment, he wished to apply for permission to amend, then he should submit a draft. But I also indicated that there might be further issues to be addressed. In an internet publication there is no presumption of publication as there is with the print copy of a newspaper (*Amoudi v Brisard* [2007] 1 WLR 113, [2006] EWHC 1062 (QB) at para 37), and no presumption that a reader who has read one article on a blog will have read all the other articles.

20. Further, Mr Scherbel-Ball has made clear that he would wish to submit there are no particulars pleaded in the Particulars of Claim which amount to a proper plea of malice in accordance with the established case law (eg *Telnikoff v Matusevitch* [1992] 2 AC 343 and *Horrocks v Lowe* [1975] AC 135), nor any special damage alleged, such as would be necessary for a claim in malicious falsehood.

21. The Defendant also applied to strike the claim out as an abuse of the process of the court on the basis of *Jameel v Dow Jones* [2005] QB 946. But Mr Scherbel-Ball rightly accepted that if the words complained of are capable of referring to the Claimant, then this would be a difficult argument to maintain. I have not needed to consider this separate basis for the application before me.

CONCLUSION

22. It is for the reasons given in this judgment that I held that the words complained of are not capable of referring to the Claimant. Since this judgment turns entirely on the law of defamation where the words complained of do not refer to any particular individual amongst a group or class, it follows that the fact that the Claimant has failed at this stage implies nothing adverse to his reputation.