

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL
2 July 2004

Before:

THE HONOURABLE THE HON. MR JUSTICE GRAY

Between:

Mr Brian Yosef MACCABA

Claimant

- and -

Dayan Yisroel Yaakov LICHTENSTEIN

Defendant

**Clive Freedman QC and David Sherborne (instructed by Addleshaw Goddard) for the Claimant
David Price and Justin Rushbrooke (instructed by David Price Solicitors & Advocates) for the
Defendant**

Hearing dates: 20 April - 18 June 2004

HTML VERSION OF JUDGMENT APPROVED

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The Hon. Mr Justice Gray:

1. The Claimant seeks damages not only for slander and harassment but also for breach of confidence or, as I shall call it following the decision of the House of Lords in *Campbell v. MGN Limited* [2004] 2 WLR 1232, misuse of private information. One of the defences advanced on behalf of the Defendant in relation to the claim for misuse of private information is that the disclosure of information of which the Claimant complains took place with his consent. That is a question which was left for the jury to decide. The jury was unable to agree upon the answer to that question. It is agreed between the parties that I should decide the other issues to which the claim for misuse of private information gives rise.
2. The facts which are material to the claim for misuse of private information can be briefly described. On 25.2.01 Mr David Kohali, who is the president of the synagogue of which the Claimant is a member, approached the Defendant in order, so Mr Kohali claims, to invite him to speak at a forthcoming function. It is in the course of their meeting on 25.2.01 that the Defendant is alleged to have spoken words slanderous of the Claimant. It was the evidence of Mr Kohali that on the evening of that day he sent a fax to the rabbi of the synagogue, Rabbi Moshe Cohen, asking him to expel the Claimant from the synagogue. Mr Kohali and the Defendant met again on 27.2.01. It is, as I understand it, common ground that they had spoken on the telephone the previous day and agreed to meet. It seems clear that the purpose of the meeting was for the Defendant to show Mr Kohali letters and poems which had been sent by the Claimant to Mrs Natalie Attar. There is a transcript of the meeting. At the outset the Defendant impressed on Mr Kohali that what he was about to show him was "confidential". It is clear from the transcript that the Defendant then read out to Mr Kohali (who had forgotten to bring his

spectacles, so he said) extracts from the letters and poems. This is the disclosure of which the Claimant complains as being a misuse of his private information. It is not suggested that the disclosure went further than Mr Kohali.

3. It is common ground that the first question which I have to decide is whether the content of the poems and letters constitutes private information such as would enable the Claimant to complain of its being misused. Mr Sherborne for the Claimant argues that correspondence of this nature is a prime example of the kind of information which the court will protect. The letters and the poems contain information relating to the Claimant's feelings for Mrs Attar, including his declarations of love for her. Mr Rushbrooke for the Defendant submits, in reliance upon the decision of the House of Lords in *Campbell v. MGN* [op cit], that the test is whether the Claimant had a reasonable expectation of privacy in relation to the disclosed facts. He cites for example Lord Nicholls at paragraph 21:

"Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy".

Mr Rushbrooke contends that in all the circumstances the Claimant had no reasonable expectation of privacy in relation to the contents of the letters and poems since they were unsolicited, shocking in their content and constituted an invasion of Mrs Attar's right to privacy. He adds, in reliance on *A v. B plc* [2003] QB 195 that this is one of the weak claims for privacy which will be readily overridden by the Defendant's right to freedom of expression as envisaged at paragraph 11(vii) of the judgment in that case. Mr Rushbrooke relies also on paragraph 137 of the speech of Lady Hale in *Campbell v. MGN*.

4. My initial view was that the points made by Mr Rushbrooke bear principally on an issue to which I shall shortly be turning, namely whether there was just cause for or a public interest in the disclosure to Mr Kohali. On reflection, however, I have concluded that Mr Rushbrooke's points come into play when considering the anterior question whether the contents of the letters and poems qualify as private information. I say that principally because of the way Lord Nicholls puts the test in the passage from *Campbell v. MGN* cited earlier. He says that the touchstone is whether *in respect of the disclosed facts* (emphasis added) the person in question had a reasonable expectation of privacy. I agree with Mr Sherborne that as a general rule correspondence between A and B on private matters such as their feelings for one another would be a prime candidate for protection. But the position appears to me to be different where A is a married man expressing in unsolicited letters his love for a young woman married to another man; referring to his sexual ambitions for her and making what I would for present purposes treat as a semi-serious proposal to pay her husband a large sum for her release. In those respects I accept that the Claimant's correspondence and poetry are properly described as shocking and immoral. Can it be said that an expectation on the part of the person responsible for those documents that the facts disclosed in them should be kept private would be a reasonable one? I think not. In my judgment the claim in confidence fails on this ground.
5. But for the sake of completeness I must consider the defence which is raised by the Defendant to this claim, namely that the disclosure was in the public interest or, as I would prefer to put it in the present case, whether the disclosure was justified in the sense that there was just cause for it to take place. As to this the case advanced by Mr Sherborne is that there was no legitimate reason for the Defendant to communicate the contents of the letters and poems to Mr Kohali. He points out that Mr Kohali had not been authorised to act as an investigator and warns me against treating this defence as being akin to the defence of privilege which arises in relation to the claim in slander. Mr Sherborne further argues that the proper course was for disclosure to be made in the forthcoming Beth Din proceedings. Mr Sherborne contends that the letters and poems are not disgraceful in themselves but only become so in the context of the assaults and sexual harassment which Mrs Attar alleges took place but which are denied by the Claimant. It was, according to the Claimant's case, a consensual relationship and the documents should be seen in that light.
6. I have already summarised the reasons why Mr Rushbrooke asserts that the disclosure to Mr Kohali was justified. In essence he argues that the letters and poems reveal so deplorable state of affairs that the Defendant, in his capacity as the rabbi to whom Mrs Attar had turned for advice, had just cause for disclosing the material to the President of the synagogue attended by the Claimant.
7. I accept that the disclosure was justified in the sense that the Defendant had just cause for informing Mr Kohali of the contents of some at least of the letters and poems. I say that for the following reasons. In the first place, it is important to note that the disclosure was a very limited one: it was to a single person and it was made with the express stipulation that the information should be kept confidential. Moreover I accept that Mr Kohali was someone who the Defendant was, objectively speaking, entitled

to treat as a person with a legitimate interest in being informed of the contents of the letters and poems. Mr Kohali was the president of the synagogue attended by the Claimant and so had good reason for wishing to be informed about conduct which would according to the evidence have been regarded by members of the community as deserving of the highest condemnation. I am of the opinion that, for the reasons already given, the contents of the letters and poems was such that the Defendant was entitled to make them known to Mr Kohali; who would then be able to decide what, if any, action needed to be taken in relation to the Claimant. There was a time when the defence of justification or just cause was expressed in the formula that the law of confidence cannot be invoked to prevent the disclosure of "iniquity". Iniquity is nowadays regarded as no more than one aspect of a broader defence of public interest or just cause. It seems to me that the letters and poems disclose facts which are "iniquitous". In my judgment on this ground also the claim in confidence fails.

8. As to damages, I need say no more than that, if the question of compensation had arisen for decision, I would have taken the view that any award would have been a very modest one.