IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST
[2019] EWHC 1000 (QB)

Claim No. HQ18M91315

Royal Courts of Justice

Friday, 8 March 2019

Before:

MR JUSTICE NICKLIN

B E T W E E N :

BARBARA HEWSON — Claimant

- and -

(1) TIMES NEWSPAPERS LIMITED

(2) ASSOCIATED NEWSPAPERS LIMITED

Defendants

WILLIAM BENNETT appeared on behalf of the Claimant.

DAVID PRICE QC appeared on behalf of the First Defendant.

DAVID GLEN appeared on behalf of the Second Defendant.

J U D G M E N T

MR JUSTICE NICKLIN:

1. These libel proceedings are brought by the Claimant against the publishers of *The Times* and the *MailOnline* for articles published on 12 April 2017. I do not need to set out the text of the articles complained of for the purposes of this judgment.

2. The Claim Form was issued on 10 April 2018. The Particulars of Claim are dated 12 June 2018. The meaning that the Claimant contends that both articles bear is:

> '… it is highly likely or reasonably suspected that the Claimant committed the following criminal acts:
>
> (a) threatened to murder a law student several times by personally telephoning him to make death threats;
>
> (b) impliedly threatened to cause physical harm to the law student's ex-partner and his daughter by sending the law student a picture of his address, his ex-partner's details and a picture of his daughter's head and, as part of her campaign to intimidate and frighten him, further harassed him by pestering him so incessantly with nuisance phone calls that he had been left feeling frightened, alarmed, distressed and anxious to the point that his exams might be jeopardised."

3. Neither Defendant at this stage has filed a Defence. Instead, following an Application by Order of 20 December 2018, the Court directed that meaning should be tried as a preliminary issue. In consequence, the time for the filing of a Defence for both Defendants has been extended until the preliminary issue has been determined.

4. The First Defendant contends that *The Times* article bears the meaning:

> "… that there were grounds to investigate whether [the claimant] has committed the acts which are attributable to her in the article by Mr Desai and Ms Philimore".

5. The Second Defendant contends that the *MailOnline* article bears the meaning:

> "(1) The Claimant had been the subject of an investigation by the Metropolitan Police over allegations that she engaged in harassment of Sarah Philimore and had been issued with a harassment warning from the Metropolitan Police in light of those allegations.
>
> (2) There were sufficient grounds to investigate the Claimant of having engaged in the harassment of Sarah Philimore, and Ms Philimore's supporters such as Mehul Desai, by making repeated abusive and threatening communications towards and about them (including in Mr Desai's case, death threats).
>
> (3) There had been at least 3 complaints to the Bar Standards Board concerning the Claimant's behaviour in this regard."

6. Directions for the trial of a preliminary issue were given in an Order of 8 February 2019. In this action, all parties have, at the moment, agreed that the preliminary issue can be determined by the Court without an oral hearing on the basis of the parties' written submissions. The Order of 8 February directed the exchange of written submissions by 4.30 p.m. on 22 February 2019.

7. At 4.41 on 19 February, the Claimant's Counsel, Mr Bennett, sent an email to the Defendants indicating that the Claimant would be seeking to argue that the Court should find that both articles bore a meaning that the Claimant was guilty, or almost certainly guilty, of the acts identified in paragraphs (a) and (b) of the Claimant's meaning. In the lexicon of defamation, that was to adopt a *Chase*-level 1 meaning. That meaning was higher than the meaning that was originally pleaded. In his email to Mr Price and Mr Glen, who are respectively representing the First and Second Defendants, Mr Bennett said,

> "It is just to let you know I am going to argue that the articles, in fact, bear Level 1 meanings (guilt) or that the Claimant 'almost certainly' carried out the acts alleged concerning Mr Desai. 'Highly likely' will still be in the mix as an alternative."

8. Pursuant to the direction made on 8 February 2019, the parties duly submitted their written submissions. In his submissions for the Second Defendant, Mr Glen responded to the Claimant's new case on meaning and contended, in paragraphs 5 and 6 of his submissions, as follows:

> "[The Second Defendant] does not accept that the claimant can simply depart from her pleaded meaning at this stage of proceedings.
>
> (a) While it is of course the case that the Court is not bound by the formulations advanced by either party in determining the actual single meaning, a Claimant's pleaded meaning remains a significant touchstone. In particular, it is settled law that the Claimant's meaning serves to define the high watermark of her claim in defamation – a point emphasised by Lord Diplock in *Slim v Daily Telegraph* [1968] QB 157, at 175:
>
> > '*The plaintiffs, as they were entitled to do, chose to set out in their statement of claim the particular defamatory meaning which they contended was the natural and ordinary meaning of the words. Where this manner of pleading is adopted, the defamatory meaning so averred is treated at the trial as the most injurious meaning which the words are capable of bearing, and the plaintiff is, in effect, estopped from contending that the words do bear a more injurious meaning and claiming damages on that basis. But the averment does not of itself prevent the plaintiff from contending at the trial that even if the words do not bear the defamatory meaning alleged in the statement of claim to be the natural and ordinary meaning of the words, they nevertheless bear some other meaning less injurious to the plaintiff's reputation but still defamatory of him, nor does it relieve the adjudicator of the duty of determining what is the right natural and ordinary meaning of the words, though nice questions may*

arise as to whether one meaning is more or less injurious than another. C'est pire qu'un crime c'est une faute.'

(b) Although the Claimant could seek permission to amend her Particulars of Claim to complain of a different meaning, such an application has not been issued and would be highly unusual in any event. The Claimant's pleaded meaning was settled more than 12 months after publication, following a period of close and protracted consideration of the Article and with the benefit of specialist legal advice (albeit the natural and ordinary meaning of a publication was a matter which would have been, and plainly was, readily understandable to the Claimant herself anyway). The fact that she did not feel able originally to plead that the Article bore a meaning of guilt is telling and a matter which the Court can legitimately have regard to when forming its own assessment. [Reference is made to Tugendhat J's decision in *Dell'Olio v. Associated Newspapers* [2011] EWHC 3472 QB [30] to [31]]. In any event, it is very difficult to see any justification for the Claimant seeking to adopt a different position now, still less that she should be allowed to do so at such short notice, on the eve of the effective trial of meaning and where substantial time and costs have already been incurred by both Defendants in addressing the Claimant's pleaded stance."

9. When Mr Price's submissions were filed in accordance with 8 February order, he did not deal with the Claimant's new case on meaning, but, subsequently, he confirmed that the first Defendant also objected to the attempt to raise the level of the meaning beyond than that which was originally pleaded. He did not, however, want to submit any supplemental written submissions beyond those which had already been set out the First Defendant's written submissions as to the meaning it contended the Court should find *The Times* article to bear.

10. On 25 February 2019, I directed that, if the Claimant wished to rely upon a different meaning from that which she had pleaded in her Particulars of Claim, then by 4.30 on 26 February 2019 she was required to notify the Defendants, in writing, of the meaning that she was now contending the Court should find the words complained of to bear. The Defendants were directed to notify the Claimant in writing by 4.30 p.m. on 27 February 2019 whether they consented to an amendment to the Particulars of Claim to substitute this new meaning. In the event that consent was not forthcoming, the Claimant was directed to issue and serve an Application Notice by 4.30 p.m. on 28 February 2019 seeking permission to amend.

11. Neither Defendant consented to the amendments. The Application Notice was then issued by the Claimant on 28 February 2019 and I directed that it be heard today.

12. The revised meaning for which the Claimant seeks permission to amend is as follows (with underlining showing the words sought to be added by amendment):

"<u>The Claimant committed, or it is almost certain that she committed, or</u> it is highly likely or reasonably suspected that the Claimant committed the following criminal acts:

(a) threatened to murder a law student several times by personally telephoning him to make death threats;

(b) impliedly threatened to cause physical harm to the law student's ex-partner and his daughter by sending the law student a picture of his address, his [ex]*-partner's details and a picture of his daughter's head and, as part of her campaign to intimidate and frighten him, further harassed him by pestering him so incessantly with nuisance phone calls that he had been left feeling frightened, alarmed, distressed and anxious to the point that his exams might be jeopardised."

13. The evidence supporting the application for the amendment is limited. The final paragraph stated:

> "The Claimant regrets that the meaning now contended for was not set out in the Particulars of Claim. She apologises for any inconvenience caused to the Court and to the Defendants. The evidence has not altered since the matter was pleaded, but the Claimant's interpretation of it has. This could not be foreseen."

14. Although it could have been a matter of inference, it has now been stated expressly at the hearing that the change of heart as to the interpretation of the meaning of the articles was that of Mr Bennett and he has indicated that clearly to the Court today. So it is a change of mind of the legal advisors as to the relevant *Chase*-level that could be argued in relation to the two articles.

Principles to be applied on applications for Permission to amend

15. The general principles in relation to amendment applications are very familiar and they are stated in the judgment of Peter Gibson LJ in *Cobbold v. Greenwich London Borough Council* (unreported CA, 9 August 1999):

> "The overriding objective of the CPR is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon, provided that any prejudice to the other party caused by the amendment can be compensated for in costs and the public interest in the administration of justice is not significantly harmed."

16. When considering whether to grant permission to amend, the Court is exercising a power in the CPR and so must have regard to the overriding objective. This involves dealing with cases justly and at proportionate cost, ensuring that the case is dealt with expeditiously and allocating to it no more than a fair share of the Court's limited resources.

17. The party seeking permission to amend must also show that his or her proposed amendment has a real prospect of success. In that respect, the test is the same as that applied under CPR Part 24.

18. The later that a party seeks permission to amend, the greater the likelihood that his or her amendment may be refused, on the grounds of the disruption that it is likely to cause to the litigation, particularly if it risks jeopardising a trial date. That may lead to the Court to the conclusion that the prejudice caused by a late amendment is too great and to refuse the application. Mr Glen has referred me in his skeleton argument to the authorities of *Worldwide Corporation Ltd v. GPT Limited* (unreported CA, 2 December 1998) and also *Swain Mason v. Mills & Reeve (Practice Note)* [2011] 1 WLR 2735. What I derive from those authorities is that, where a late

amendment is sought, which, if allowed, would cause substantial disruption to the litigation, particularly a trial, the party seeking the amendment will bear a "heavy onus" to justify it. In *Swain Mason* Lloyd LJ said [106]:

> "There is a heavy burden on a party who seeks to raise a new and significantly different case so late as the opening of the trial. The Court will assess the impact not only on the immediate parties to the litigation, but the knock-on effect on civil justice generally. Adjournments of trials at the last-minute cause huge disruption and add to the delays in disposing of other cases."

19. In his skeleton, Mr Glen has also referred to [104] and extracts the following four principles as being the most relevant factors having a bearing on the Court's decision:

    (a) the terms of the proposed amendment;

    (b) the previous history surrounding the amendment, including the sequence of events which led to it first being raised;

    (c) the absence of any evidence explaining why the proposed amendment was raised so late; and

    (d) any factors relevant to the prejudice to each party.

Submissions

20. Mr Bennett, for the Claimant, submits that the proposed amendment has a real prospect of success. The amendment does not introduce, he submits, any new evidence. It is simply a revised contention as to what meaning the Claimant contends the articles to bear. The Defendants are occasioned, he submits, no real prejudice. Their submissions already set out their case as to meaning. That cannot be affected by the Claimant's rival contention as to meaning and the litigation is at a very early stage. No defence has been served, so there will be no consequential amendments. Reliance upon the authorities governing late amendment of trials does not apply, either at all or with such force, when the relevant "trial" being referred to is a trial of a preliminary issue on meaning, in which no evidence is admissible. There will be no change to the evidence; there will be no question of further disclosure. Put simply there is nothing approaching the degree of disruption to the litigation process that risks being caused by late amendments at or shortly before what he has described as a "full trial".

21. Mr Price QC, for the first Defendant, contends that the Court has not been provided with a proper explanation for why the *Chase* Level 1 meaning was not included in the Particulars of Claim when it was originally pleaded. He, of course, has now had the explanation from Mr Bennett, but he submits that it is significant that the original Particulars of Claim were settled by Mr Bennett, an experienced defamation counsel, and that it did not allege a meaning of guilt. He argues that this implicitly is a concession that the repetition rule did not apply so as to require the articles to be given the same meaning as the complaint. He submits that it was also implicitly conceded that the articles did not adopt or endorse the complaint. In order, he submits, for the Claimant to show that her proposed amendment has a real prospect of success, she needs to explain how she can reconcile a Level 1 meaning with the decision in *Brown v. Bower* [2017] 4 WLR 197.

22. Mr Glen, for the Second Defendant, argues that permission to amend ought to be refused on the grounds of lateness and delay. He contends that the effect of the late application for an amendment

has "derailed" the envisaged timetable for the resolution of the preliminary issue. He points to the lack of any explanation, good or otherwise, for the change in position. If the change simply arose from the change of opinion, upon further "reflection", a word that originally appeared in Mr Bennett's submissions on the issue of meaning, then that is an inadequate explanation. The Second Defendant considers that it would be unfair and contrary both to the overriding objective and the long-established principle from ***Slim*** to allow the Claimant to reopen her pleaded meaning.

Decision

23. When determining meaning as a preliminary issue, it is the Court's task to determine the single, natural and ordinary meaning of the words complained of and that is the meaning that the hypothetical ordinary, reasonable reader would understand the words to bear (*Koutsoglannis v. The Random House Group Limited* [2019] EWHC 48 QB [11]). The principles that govern the assessment of meaning are set out in that authority in [12] to [15].

24. ***Slim*** is the source of the principle that the Claimant cannot ask the Court to find a meaning that is higher than his or her pleaded meaning. The origins of and justification for that rule were rooted in practicality and good case management. When libel actions were tried by juries, a Claimant could not invite the jury to find a meaning higher than he or she had pleaded, because to do so would be substantially to move the goalposts at trial. For example, a defendant who had pleaded a defence of truth to the originally-pleaded meaning, or a substantially similar *Lucas-Box* meaning, might then be facing a wholly different case without the opportunity properly to prepare for it. The rule in ***Slim*** was therefore an "anti-ambush" provision. It could be argued that, in the era where meaning is tried as a preliminary issue, and in advance of any trial of any substantive defence, the rule loses some of its force. Indeed, it might be thought to insert artificiality into the process. If it is the Court's role to determine the single meaning, why should that be constrained by the interpretation advanced by the Claimant?

25. Interesting though this point is, it does not, in fact, matter. As Mr Glen, on behalf of the Second has accepted, quite properly, the rule in ***Slim*** does not (and never did) prevent an application to amend by the Claimant to revise his or her meaning. The real question is whether permission to amend should be granted and ***Slim*** on that has no bearing on the issue.

26. Each Defendant makes a different submission as to whether the proposed amendment has a real prospect of success. Mr Glen does not go so far as to suggest that the proposed amendment should be refused on the ground that it has no real prospect of success. He rests his submissions on the basis that, as an exercise of discretion, the Court should refuse the application for the amendment because of its lateness; the court should not permit on the eve of trial a Claimant to alter his or her meaning. Mr Price, however, argues that the proposed amendment has no real prospect of success. In addition to what could be described as discretionary factors, he argues that it should be refused as a matter of principle on the grounds that, applying the law as stated in *Brown v. Bower*, the amendment to introduce a *Chase*-level 1 meaning has no real prospect of success.

27. In my judgment, whatever the effect of ***Brown v. Bower*** on the repetition rule - and that will have to be dealt with on another day, potentially when the Court actually determines meaning in this case - it is not such to lead to the conclusion that a *Chase* Level 1 meaning has no real prospect of success. The Court must assess, looking at the articles as a whole and in context, whether there is a real prospect of a guilt meaning being found by the Court. At that stage, when the Court is actually determining the meaning, the Court will consider the proper impact of the repetition rule on meaning, but, at this stage, I am just considering whether there is a real prospect of success of

a *Chase* Level 1 meaning being found by the Court. Having re-read the Articles, I am satisfied that it is not fanciful to suggest that they could convey a *Chase* Level 1 meaning. Therefore, I reject Mr Price's submission that the amendment has no real prospect of success.

28. The issue, therefore, becomes a question of whether the amendment ought to be allowed as a matter of discretion.

29. I am quite satisfied that the amendment should be allowed to enable the Claimant to advance her revised case on meaning so that "*the real dispute between the parties can be adjudicated upon*". If, ultimately, the Court decides the Articles do not bear a *Chase* Level 1 meaning, then the Defendants suffer no real prejudice by the amendment beyond having to deal with the revised argument as to meaning. If the Court does accept the articles allege some form of guilt, the effect of refusing the amendment would be to cause real prejudice to the Claimant. She would artificially be constrained to a meaning which, *ex hypothesi,* the Court has found was not the meaning that the articles bore.

30. In my judgment, the authorities on late amendments have limited bearing on the circumstances in this case. The Court had ordered a trial of a preliminary issue on meaning. As it happens, that was going to be determined by the Court on paper and without a hearing. Although notified rather late in the day, the Claimant's revised meaning has not caused the loss of a trial date. It will cause some delay. As I indicated in argument, had the amendment not been sought, I would probably have been able to determine the preliminary issue last week. That will now be delayed, but I accept Mr Bennett's submissions that the disruption that the amendment has caused is limited. The reality is that the amendment is sought to enable the Claimant to revise her submission as to meaning. She only needed to make that application to amend because of the rule in ***Slim***. I accept that this is a change in position and the Claimant had hardly provided a fulsome explanation for that before the hearing today, but the explanation is that her advisers have reviewed their assessment of the meaning. It is not suggested by either Defendant that that explanation ought to be rejected as not being truthful or that the Claimant is guilty of some other form of overreaching in seeking this amendment.

31. In the final analysis, the Court should, so far as possible, permit and enable the real dispute between the parties to be determined. The determination of meaning is very important in defamation claims. I am satisfied that the prejudice to the Defendant by allowing the amendment is limited, practically, to the inconvenience of a short delay and, to the extent they are needed, any further submissions in response to the Claimant's new case. I cannot accept Mr Glen's submissions that the Second Defendant would have taken a materially different course had a *Chase* Level 1 meaning have been pleaded from the outset. It has always been the position that a defendant has to make its own assessment of meaning and act accordingly. If, for example, a defendant considers that the Claimant's meaning is too high, but accepts that the publication bears a lower defamatory meaning that it cannot defend, the offer of amends route would be available. No such step was taken by either of these Defendants, so I really cannot see how matters would have been substantially different had the Claimant advanced a *Chase* Level 1 meaning from the outset.

32. I do not consider that the position that the parties are now in, having to face a *Chase* Level 1 meaning, puts them in any difficult or onerous position. The parties have already set out their respective cases on meaning. Permitting the amendment will not substantially affect those submissions if they do so at all.

33. For those reasons, I will allow the amendment.

_____

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge