Neutral Citation Number: [2021] EWHC 2180 (QB)

Case No: QB-2018-000981

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Date: Tuesday, 6th July 2021

Start Time: 11.00 Finish Time: 11.45

Before:

MR. JUSTICE SAINI

- -

Between:

QATAR AIRWAYS GROUP Q.C.S.C.

Claimant

- and -

(1) MIDDLE EASTERN NEWS FZ-LLC
~~(2) MIDDLE EAST NEWS UK LIMITED~~
(3) MBC FZ-LLC
(4) AL ARABIYA NETWORK FZ-LLC
(formerly named AL ARABIYA NEWS CHANNEL FZ-LLC)

Defendants

- -
- -

MR. THOMAS RAPHAEL, QC (instructed by **Osborne Clarke LLP**) for the **Claimant**
The Defendants were neither present nor represented

- -

APPROVED JUDGMENT (No. 3)

(via Microsoft Teams)

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MR. JUSTICE SAINI:

The CPR 17.4 application and "relation back" in Rome II

1. On the first day of this hearing, 5th July 2021, I granted QAG's application dated 26th March 2021 made under s.32A of the Limitation Act 1980 ("the 1980 Act"). For the reasons given in my ruling, I directed that the limitation period under s.4A of the 1980 Act would be disapplied in respect of QAG's claims against the Fourth Defendant, AAN FZ. That is, the limitation period would be disapplied in all claims whether in malicious falsehood, conspiracy and unlawful interference and includes claims to which foreign law is applicable.

2. The context in which this application was made is the argument by the Defendants that the original joinder of AAN FZ under CPR 17.1 on 27 November 2018 was a nullity because the malicious falsehood claim was time barred as at that date. I refer to the Jurisdiction Judgment [2020] EWHC 2975 (QB), at [281] and following for a fuller description of the issues. I rejected that argument but granted permission to appeal to the Court of Appeal on that question. That is Ground 3 of the pending appeal. The purpose of QAG's application under s.32A of the 1980 Act was to create an alternative route for it to be able to pursue prima facie time barred claims. They have succeeded in creating that route.

3. However, in addition, and also in its application of 26 March 2021, QAG applied under CPR 17.4(2) and CPR 19.5 for permission to amend to the extent necessary to enable it to pursue time barred claims against AAN FZ. It was submitted that this was a precautionary application in the event that in due

course, either by reason of a successful appeal or some other reason, the disapplication of s.4A is not effective to allow QAG to pursue time barred claims.

4. The CPR 19.5 aspect was not pursued before me, and I have adjourned it. The CPR 17.4(2) application was argued orally. This application was not opposed by the Defendants although they did not appear at the hearing and their solicitors, Wiggin LLP, came off the record pursuant to my Order at the start of the hearing yesterday. Accordingly, this ruling is not informed by argument in opposition but leading counsel for QAG has drawn my attention to all material points, particularly case law, in a helpful and comprehensive fashion. He has presented his application fairly.

5. On the merits, I have no hesitation in granting the CPR 17.4 application. The pleadings show that the claims in malicious falsehood against AAN FZ arise out of substantially the same facts and issues as: (i) are already in issue on the claims in conspiracy/unlawful interference against AAN FZ, (ii) are already in issue on the claims against the other Defendants; and (iii) are in issue in respect of the claims to the extent that they are governed by foreign law. They do not require further investigations or at any rate not significantly wider investigations. The same people were involved in creating and publishing the same video.

6. However, I need to address what was called the "relation back" point in the context of the CPR 17.4 application. It is said that this application inherently requires determination that "relation back" applies. It is also said that that same "relation back" principle applies to the CPR 17.1 amendment which

QAG made earlier in these proceedings when first joining AAN FZ (and the objection to which has been abandoned by the Defendants). I agree that the same issue of principle arises.

7. In addressing this issue, I will begin with some background. In their arguments under CPR 17.1(1), as advanced before me in October 2020 (and which the Defendants appear to continue to advance on appeal) it was inherent in their position that "relation back" and section 35 of the 1980 Act applied, and applied with respect to whatever claims could be made by QAG. That was because, if there was no "relation back", the Defendants would not have been prejudiced by the amendment made under CPR 17.1(1) without permission.

8. However, in the Defence, somewhat surprisingly, it is pleaded that even if the CPR 17.2 application fails, and even if the Ground 3 appeal fails – i.e. even if the amendments under CPR 17.1(1) are not disallowed and are valid – the claims against AAN FZ are time barred by s.4A of the 1980 Act. It is not clear from the evidence of the Defendants or from their solicitors' correspondence as to how this argument is said to work and in the absence of representation at the hearing before me, the puzzle remains.

9. It is fair in these circumstances for leading counsel for QAG to submit that the Defendants may be taking a point that there is no "relation back" for the claims against AAN FZ. The Defendants may be saying that whichever law is applicable, there is no "relation back". The question of whether "relation back" applies is therefore one that needs to be addressed.

10. As I have indicated, the answer to that question will also define the status and efficacy of the amendments made under CPR 17.1(1,) which were challenged

by the Defendants' abandoned CPR 17.2 application and the amendments being made under CPR 17.4, and it would be a reason why amendment under CPR 17.4 could be resisted were the Defendants to voice opposition.

11. The Limitation Act 1980, section 35(1)-(2) provides:

> "35 New claims in pending actions: rules of court.
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
>
> (a) the addition or substitution of a new cause of action; or
>
> (b) the addition or substitution of a new party;
>
> and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings"

12. Thus a claim against a new defendant which joins that new defendant to the claims already made against existing defendants, is a "new claim" not made by way of "third party proceedings", because it is excluded from the definition of third party proceedings in the last clause of s.35(2), from "other than". So "relation back" in s.35(1)(b) applies in principle to the claims against AAN FZ with effect from the date of the original action, namely 9th August 2018.

13. The only way, therefore, that "relation back" would not apply to the claims against AAN FZ is if this were due to some principle of the conflicts of laws. It is uncontroversial that "relation back" would apply to claims outside Rome II, where the applicable law is to be determined by common law rules. Malicious falsehood may be such a claim but as I identified in [166] of the Jurisdiction Judgment, the position may not be clear. In any event, the other claims, conspiracy and unlawful interference, are Rome II claims.

14. For some of the reasons given by leading counsel for QAG, I agree that "relation back" does apply under Rome II. Although there may be a number of routes which lead to this conclusion, in my judgment the answer is provided by the Court of Appeal's obiter decision in ***Tatneft v Bogolyubov*** [2018] 4 WLR 14 at [77]-[87] and it would not be appropriate in an uncontested hearing to venture further.

15. Periods of limitation under the Rome Regulations must be understood as periods of limitation to which CPR 17.4 and 19.5 apply. This is because they are within CPR 17.4(b)(iii) and CPR 19.1(c), as reasoned in ***Tatneft***. CPR 17.4 and CPR 19.5 inherently operate on the basis of "relation back" and so bring "relation back" with them. Thus, under the RSC predecessors of CPR 17.4 and 19.5, Order 20 r2-5, it was held that amendment under such rules implicitly brought with it "relation back" (even without an underlying statute like s.35(1)(b) of the 1980 Act to create relation back), and the same is the case for the CPR: see ***Parsons v George*** [2004] 1 WLR 3264 at [11]-[12], [16]-[18] [24]-[26], [30], [34]-[35].

16. In my judgment, the same must be so for an amendment formally made under CPR 17.1(1) but which is justified under CPR 17.4/19.5, or an amendment made without objection on limitation grounds, where in fact a limitation period existed but the amendment could have been justified under CPR 17.4/19.5, if challenged. In such a case, the amendment is made, or deemed to have been made, under CPR 17.4/19.5 so far as applicable. Consequently, claims/allegations under Rome II which are added by amendment are subject to "relation back" to the date of the original action.

17. In ***Taftneft***, the Court of Appeal concluded that: (i) the Rome II Regulation was an "enactment" for the purposes of CPR 17.4(b)(iii) and so fell within CPR 17.4 because it was an enactment which provided for the application of limitation rules, but which "allowed" amendment, in the sense that it left amendment to English rules of law and notably CPR 17.4/19.5; and (ii) consequently, the amendments could be permitted under CPR 17.4 even though they were being made after expiry of the foreign law limitation period applied under Rome II, provided that they satisfied the conditions of CPR 17.4 as to "substantially the same facts and issues". The same principle must follow for CPR 19.5(1)(c)), by parity of reasoning.

18. While the Court of Appeal did not spell out word for word that this meant "relation back" applied, this was to be the meaning of their decision. I note at [71] the context of the reasoning was that without "relation back", amendment under CPR 17.4 would be pointless and would be refused. At [73], the Court of Appeal then observed that before Rome II amendments post limitation worked the same way for foreign law as English law, and that the effect of the

Respondent's arguments in that case would be to deprive the court of what it called an "*important procedural power*", and create a major lacuna for which no reason had been identified. That "*important*" power is a reference to CPR 17.4 including "relation back"; otherwise the power would be pointless. At [83], the Court of Appeal observed its decision would "*enable all proceedings before the English courts to be dealt with consistently as a matter of procedure*" (which absence of "relation back" under Rome II would not produce).

19. Further, I note that the Court of Appeal (see paragraphs 81-83) was reasoning by reference to ***Parsons v George*** which as noted above also proceeded on the basis that CPR 17.4/19.5 and their RSC predecessors brought with them relation back.

20. So they were, in my judgment, concluding that the effect of their decision that CPR 17.4 applied to Rome II was that "relation back" would apply.

21. For completeness, leading counsel for QAG drew to my attention ***Vilca v Xstrata*** [2018] EWCH 27 (QB), where the court concluded that a claim under foreign applicable law by Rome II, and added by amendment under CPR 17.4, did not relate back to the commencement of the action: see paragraphs 109-113. I am satisfied, however, that when one considers the full reasoning in ***Taftneft***, the point appears to have been incompletely argued in ***Vilca*** and concessions were made which seem to be doubtful. I am not bound by that decision and base my conclusion that relation back applies on the reasoning of the Court of Appeal and the principles emerging from such reasoning, which I have described.

22. In conclusion, in my judgment "relation back" applies under Rome II as well as to the claims under English law.

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