3 June 2020

PRESS SUMMARY

Serafin (Respondent) v Malkiewicz and others (Appellants) [2020] UKSC 23
On appeal from [2019] EWCA Civ 852

JUSTICES: Lord Reed (President), Lord Wilson, Lord Briggs, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEAL

The respondent ("**the claimant**") sued the appellants ("**the defendants**") for libel in respect of an article which they published about him in Nowy Czas, a newspaper addressing issues of interest to the Polish community in the UK. The Court of Appeal found that the conduct of the trial by Mr Justice Jay ("**the judge**") in the High Court had been unfair towards the claimant. The defendants appeal against that finding. They also challenge the Court of Appeal's analysis of the effect of section 4 of the Defamation Act 2013 ("**the Act**"), which sets out the "public interest defence" to a defamation claim.

The claimant was born in Poland but has lived in England since 1984. In about 1989 he joined POSK, a Polish social and cultural association and charity. He became joint manager of The Jazz Café, a bar and café at POSK's Hammersmith premises. He also worked at Kolbe House, a charity which runs a care home in Ealing. The article was published in October 2015. The claimant asserted that it had 13 separate defamatory meanings, including that he had abused his position at POSK to award himself or his company contracts for maintenance work there; had dishonestly obtained unlawful and fraudulent profit from sales at The Jazz Café (this meaning is referred to as "**M4**"); and had diverted to himself funds needed for the care of Kolbe House's residents by securing for himself a contract for unnecessary renovations. The claimant represented himself at the hearing before the judge.

The judge found that all the article's meanings other than the five relating to Kolbe House were substantially true or, in one instance, had caused no serious harm to the claimant's reputation. But he found that in relation to all 13 meanings the defendants had established a defence to the claim under section 4 of the Act: for, in his opinion, each of them was on a matter of public interest, and it was reasonable for the defendants to have believed that publishing them was in the public interest. So the judge dismissed the claim.

The Court of Appeal allowed the claimant's appeal. It held that the judge had been wrong to uphold the defence under section 4; that he had not been entitled to find that M4, which it described as the "most serious" of the allegations, was substantially true; and that the claimant was entitled to damages in respect of M4 and the meanings relating to Kolbe House. Lastly, after reviewing transcripts of the hearing, it held that the "nature, tenor and frequency of the judge's interventions were such as to render [the trial] unfair". It ordered that the quantification of damages be remitted to a judge other than Mr Justice Jay but did not order a full retrial. The defendants now appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. But, in place of the Court of Appeal's order that only the assessment of damages be remitted, the Court orders that the case be remitted for a full retrial. Lord Wilson gives the only judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

Unfair trial

The Court of Appeal was correct to treat the claimant's allegation as being that the trial had been unfair, not that the judge had given the appearance of bias against him. For it is far from clear that an informed and fair-minded observer would consider that the judge had given that appearance **[39]**. The authorities on an inquiry into the unfairness of a trial establish the following principles: a judge's interventions should be as infrequent as possible during cross-examination of witnesses, and he must remain above the fray and neutral while evidence is being elicited; the quality of the written judgment cannot render a trial fair in circumstances where the judge's interventions at the hearing prejudiced the exploration of evidence; and where a transcript exists, it is not the present practice of higher courts to invite the judge to comment on the allegations, but the fact that he is unable to comment requires those courts to analyse the evidence with great care **[40-45]**. Unrepresented litigants are unlikely to be equipped to withstand judicial pressure and so the judge must temper his conduct accordingly **[46]**.

The factual analysis of the conduct of the trial is set out in the schedule to Lord Wilson's judgment **[47]**. It is important to remember (among other things) that the excerpts from the transcript which are reproduced there were separated by long stretches of evidence in respect of which no criticism of the judge can be made. But the transcripts do nevertheless show that the judge directed a "barrage of hostility" towards the claimant's case and towards the claimant himself acting in person. In doing so the judge used "immoderate, ill-tempered and at times offensive language". The Court is driven to uphold the Court of Appeal's conclusion that the judge did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and that the trial was unfair. Instead of making allowance for the claimant's being unrepresented, the judge "harassed and intimidated him" **[48]**.

The logical consequence of a conclusion that a trial was unfair is an order for a complete retrial. So it is hard to understand the Court of Appeal's order that all the issues relating to the determination of whether the defendants were liable to the claimant had been concluded. Conscious that the justice system has failed both sides, the Court, with deep regret, must order a full retrial **[49]**.

Public interest defence

The House of Lords' decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 established the existence at common law of a specific defence to a claim for defamation brought in relation to publication of a statement on a matter of public interest. Where the defamatory material concerned such a matter, the defendant had to show that it had met the standard of "responsible journalism", measured by reference to a list of ten factors **[53-56]**. Section 4 of the Act replaced the "*Reynolds* defence" with a new defence which, on any view, draws on the principles in *Reynolds* and later cases **[58, 68-69]**. The section 4 defence is available where the defendant "reasonably believed that publishing the statement complained of was in the public interest" (s.4(1)(b)) **[52, 62]**. In assessing reasonableness, the Court must (among other things) "have regard to all the circumstances of the case" (s.4(2)) **[52, 65]**. Reference to the *Reynolds* factors was deliberately omitted from the section **[62, 69]**.

The Court of Appeal was wrong to state that the *Reynolds* defence and the section 4 defence are not materially different: for the elements of the two cannot be equated **[68, 72]**. It was also inappropriate for the Court of Appeal to regard the *Reynolds* factors as a "check list" in the context of section 4 **[69, 77]**. For these and other reasons, the new judge should determine whether the public interest defence is available to the defendants without reference to the Court of Appeal's reasoning on section 4 **[78]**.

References in square brackets are to paragraphs in the judgment