Case No: IHJ/11/0011

Neutral Citation Number: [2011] EWHC 1164 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 18 February 2011

BEFORE:

MRS JUSTICE SHARP

BETWEEN:

JANE CLIFT

Claimant/Applicant

- and -

MARTIN CLARKE

Defendant/Respondent

MS CLIFT appeared in person

MS S PALIN (instructed by Associated News Ltd) appeared on behalf of the Defendant

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Approved Judgment

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MRS JUSTICE SHARP:

1. This is an application for an order pursuant to the Norwich Pharmacal jurisdiction for disclosure of any information that may assist in the identification of two users of the Defendant's website who posted comments in June 2009 in respect of an article reporting the outcome of the Claimant's successful libel action against her local council.

2. The Defendant is employed by Associated Newspapers Limited ("ANL") as the editor of its website, known as Mail Online.

Background facts

3. The background facts are as follows. On 25 June 2009 the Claimant won a claim for libel against Slough Borough Council arising out of the publication of the Claimant's name on the Council's Violent Persons Register, which was circulated to a large number of Council employees and partner organisations. The jury awarded the Claimant damages of £12,000.

4. On 26 June 2009 the Daily Mail published an article in its print edition, reporting the outcome of the Claimant's court case entitled "I was turned into a pariah for complaining about a yob". An almost identical version was published on Mail Online with the same headline. The day before that, that is on 25 June 2009 when the outcome of the trial was announced, Mail Online published an earlier version of the article, with the headline "Woman branded 'potentially violent' by council after complaining about damaged flowerbed."

5. Readers of Mail Online are encouraged to comment on articles and also on the comments of other readers. A section appears beneath the articles for their comments to appear. The Claimant's current complaint concerns 2 out of the 40 comments which were posted by readers of Mail Online in the "Comments" section appearing beneath the articles to which I have referred.

6. On 13 June 2010 the Claimant complained to the author of the articles, who was a reporter for the Daily Mail, about the two comments appearing beneath his article on Mail Online. I should add there is no complaint made by Ms Clift at all about any of the articles published by ANL itself.

7. The comments complained of by the Claimant and which are the subject of this application are as follows:

> (1) "My, I didn't realise the cost of flowers nowadays. This woman would have been better finding another way to enrich her existence... thereby saving lots of public money."

This comment was posted by "Bob" of "Windsor, England" on 25 June 2009 at 12.39, that is a matter of hours after the article which it related to was published.

> (2) "I am surprised to see how many people on here seem to think it is OK for members of the public to issue death threats against

> council employees. With attitudes like that is easy (sic) to see why so many doctors, nurses and socilal (sic) workers are physically and verbally abused each year."

This comment was posted by "Chris Jones" of "Leeds" on 26 June 2009 at 12.34.

8. On 16 August 2010 the Claimant issued a claim form and application notice, asking for an "Order for the disclosure of any information known to the Defendant that would or may assist in the identification of the authors of the words complained of published on the Defendant's website." The Claimant says she asked for this information for the purpose of bringing defamation proceedings against the persons presently identified as "Bob" and "Chris Jones".

9. The Defendant/ANL objects to the application. On 7 December 2010 the Defendant wrote to the Claimant, setting out ANL's position. The letter said (i) that ANL's privacy policies oblige the Defendant to respect the privacy of users of the website's information and that he is, therefore, unable to disclose the information requested without an order from the court; (ii) that ANL requires users to give a name, town and/or country and email address in registering with the site, that none of this information is verified by ANL, that the information held in respect of the name, town and/or country for these posters is what appeared in the postings and that the only additional information ANL therefore holds is the poster's unverified email addresses; (iii) that the Defendant did not consider the postings to be defamatory, alternatively if they are defamatory they are plainly fair comment. The Claimant was also asked to provide her confirmation that she would pay the Defendant's reasonable costs of the application and of complying with any order made.

10. In her witness statement dated 26 January 2011, prepared for the purposes of this application, the Claimant sets out her position. In short, she maintains that the postings are defamatory of her, that she only discovered the existence of the postings in June 2010 and that she should not bear any of the costs of compliance or of the application itself.

The Law: Norwich Pharmacal Jurisdiction

11. I turn next to the law. The general principles relating to the Norwich Pharmacal jurisdiction are well known. Three conditions must be satisfied before a court exercises the power to make a Norwich Pharmacal order: (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrong-doer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrong-doer; and (iii) the person against whom the order is sought must (a) be mixed up in the wrong-doing so as to have facilitated it and (b) be able, or likely to be able, to provide the information necessary to enable the ultimate wrong-doer to be sued. See the judgment of Lightman J in Mitsui Ltd v Nexen Petroleum Ltd [2005] EWHC 625 (Ch) at [21].

12. Ms Sarah Palin, who appears on behalf of the Defendant/ANL, draws my attention in that context to what is said in the notes in the White Book to CPR 31 at paragraph 31.18.5 where it might be thought that the condition which I have referred to at (i) above is put in slightly differently. There it is said:

> "The first requirement of the Norwich Pharmacal jurisdiction is that a wrong must have been carried out or believed to be carried out." (Emphasis added)

13. She refers in that context to the case of P v T Ltd [1997] 1 W.L.R. 1309. For present purposes, I do not think the precise wording of the matter set out at (i) is material to the decision I have to make but I would adopt, if necessary, the lower threshold in favour of Ms Clift.

14. Once the court is satisfied that these three conditions have been met, it nevertheless retains a discretion as to whether or not to order disclosure. In Totalise Plc v The Motley Fool Ltd [2001] EMLR 29 at [27], Owen J identified a number of matters which are relevant to the exercise of the court's discretion: (i) The strength of the claimant's *prima facie* case against the wrong-doer; (ii) the gravity of the allegations; (iii) whether the wrong-doer was waging a concerted campaign against the claimant; (iv) the size and extent of any potential readership; (v) the fact that the wrong-doer was hiding behind anonymity which the website allowed; (vi) whether the claimant had any other practical means of identifying the wrong-doer; and (vii) whether the defendant had a policy of confidentiality for users of the website.

15. Owen J ordered the Respondent to pay the costs of the application and in Totalise Plc v The Motley Fool Ltd [2001] EWCA Civ 1897; [2002] 1WLR 1233, the Court of Appeal reversed his decision on costs only. In the course of their consideration of that issue, it was necessary to consider the circumstances which may be relevant to a respondent legitimately refusing to hand over voluntarily, details it was subsequently ordered to provide pursuant to a Norwich Pharmacal application. Ms Palin relies in particular on what was said by Aldous LJ giving the judgment of the court at paragraphs 23 to 30, the effect of which may be summarised as follows:

> (i) Where website users have a reasonable expectation that their personal information will not be disclosed, the court must be careful not to make an order which unjustifiably invades the right of an individual to respect for his private life, as encompassed by Article 8 of ECHR, especially when that individual is not before the court.
>
> (ii) Disclosure of information pertaining to the identity of third parties also engages their rights under the Data Protection Act 1998 (the DPA). In accordance with Schedule 2 of the DPA no order for disclosure of a person's identity should be made under the Norwich Pharmacal jurisdiction unless the court has considered the rights, freedoms and legitimate interests of that data subject, and whether having regard to those rights, the disclosure is warranted.
>
> (iii) It is perfectly legitimate for a party which hosts postings provided by readers, and which reasonably agrees to keep those readers' details confidential and private, to refuse to voluntarily hand over such information. It is not the role of the party which holds the confidential information to determine whether to hand

> over that information to third parties. For example, a court may decide to refuse disclosure of the identity of a data subject where a publication, though technically defamatory, was visibly the product of a deranged mind or was so obviously designed merely to insult as not to carry a realistic risk of doing the claimant any quantifiable harm.
>
> (iv) Where a party has genuine doubts as to whether the claimant is entitled to the information sought and is under a legal obligation not to reveal the information (or where the legal position is unclear) or where the disclosure would or might infringe the legitimate interests of another, it is perfectly entitled to ask that the court rule on the appropriateness of the relief sought. The defendant's costs in that application should be paid by the claimant, together with the defendant's costs of complying with the order.

16. Ms Palin also relies on what was said by Richard Parkes QC sitting as a Deputy High Court Judge in Sheffield Wednesday v Hargreaves [2007] EWHC 2375 (QB) at [17], that is, in exercising this discretion, it would be unjustifiably intrusive and disproportionate to order the disclosure of the identities behind online postings which were barely defamatory, were little more than abuse, or which were "saloon-bar moanings", rather than serious indictments of grave mismanagement.

Information held by ANL

17. The evidence of the information held by ANL and as to its privacy policy is contained in the witness statement of Ms Hilary Kingsley, a legal advisor to ANL, employed in its legal department. As had earlier been said in the letter of 7 December 2010 she says as follows:

> "ANL retains the name, town and/or country and email address which were originally submitted by 'Bob' and 'Chris Jones' when making the postings on Mail Online. None of the information has been verified by ANL. The name, town and/or country are already included in the posting and are therefore known to the claimant. The additional information which ANL holds (that is the email address for each poster) may be insufficient to properly identify the posters. The defendant has also made inquiries as to any other identifying information ANL may hold which would assist and which it may be required to do in any event by the terms of the order which is asked for."

18. I should also refer briefly to some recent correspondence which has been put before me: namely a letter of 16 February 2011 to Ms Clift from Mr Darrell, Group Legal Advisor at ANL and Ms Clift's reply dated 17 February 2011. In relation to the inquiries to which Ms Kingsley referred, the letter to Ms Clift was written because these further inquiries have determined that ANL's former online marketing services provider may hold details of the IP addresses used when "Chris Jones" and "Bob" posted on the website; but that it would however cost about £5,500, for a search to be

undertaken by that provider, and with no guarantee that the IP addresses would be held. It would cost this much, because it is not possible to undertake a search for a period of less than six months, to cover the June 2009 postings.

19. In her letter of 17 February 2011 Ms Clift says that she is simply and reasonably asking for any information known to ANL that may assist in her legitimate aims and objectives. She goes on:

> "If, as you state, the only additional information you currently hold is an unverified email address for each poster, then disclosure of same would assist. It is apparent that you also hold the contact details for the company that provided online marketing services to Mail Online at the time of the postings and disclosure of same may also assist. Whether or not such information would be sufficient in itself to enable me to identify the posters of the words complained of is not a matter that is incumbent on yourselves. If, as you state, you do not hold data pertaining to the respective IP addresses from which these postings were made, then this information is not known to you and inherently I accept that you will not be able to disclose it."

The Defendant's privacy policy

20. All posters are required to agree to Mail Online's House Rules and Privacy Policy when submitting a comment for publication. The House Rules which matter for this purpose are rules 1 to 3, which are as follows:

> "Rule 1. We welcome your opinions. We want our readers to see and understand different points of view. Try to contribute to the thread, rather than just stating if you agree or disagree. Unless you have a witty one-liner, please explain why you hold your opinion.
>
> Rule 2. This is a public forum. Once your comment is online, everyone with internet access can read it. Please make your comment clear to ensure that it is not misunderstood. Your comment may be rated by other users and categorised, e.g. best and worst rated. You can express a strong opinion but please do not go over the top. Do not forget that you are legally responsible for what you submit. Please consider how your comment could be received by others. Many different types of people of different ages may view your comment.
>
> Rule 5. No libel or other abuse. You must not make or encourage comments which are: defamatory, false or misleading; insulting, threatening or abuse; obscene or of a sexual nature; offensive, racist, sexist, homophobic or discriminatory against any religions or other groups."

21. The elements of the Privacy Policy which Ms Palin relies on for the purposes of this application are as follows:

> "We collect personal information from you (such as name, address, telephone number, email address et cetera) when you complete registration or enquiry forms, submit comments to the site, participate in message boards, blogs and other such user-generated content facilities or send emails to us. Please do not submit your personal information to us if you do not wish us to collect it ... The information collected by cookies and web beacons is not personally identifiable, it includes general information about your computer settings, your connection to the internet, e.g. operating system and platform, IP address, your browsing patterns and timings of browsing on the site and geographical location ... By using the site you agree that we may disclose your personal information to any company within the Daily Mail and General Trust Plc group of companies.
>
> Subject to obtaining your consent, we may also supply personal information about you to third parties.
>
> We reserve the right to disclose your personal information to comply with applicable laws (such as the Data Protection Act 1998) and government or regulatory bodies' lawful requests for information."

Application of the legal principles to facts

22. I turn next to the application of the legal principles to the facts. Ms Palin accepts that the three conditions required for the Norwich Pharmacal jurisdiction to be engaged are satisfied. First, a wrong has arguably been carried out by the posters (or is believed to have been carried out in accordance with the lower threshold test, to which I have already referred), though this is subject to her further submission that there are severe impediments to the Claimant successfully advancing a claim in libel, a matter she relies on in the context of discretion. Second, the Claimant needs to be able to identify the posters to bring a legal action against them. Third, the Defendant/ANL is mixed up in the wrong-doing, so as to have facilitated it and may be able to provide the information necessary to enable the ultimate wrong-doer to be sued.

23. However, Ms Palin invites me to conclude that this is a case where the court, in the exercise of its discretion, should refuse the application having regard to two principal matters; first, the weakness of the claim which the Claimant wishes to bring against the posters; and second, the legitimate rights and expectations of all the parties concerned, including those of the posters and the Defendant/ANL in accordance with the principles set out above. As to the latter matter, I shall deal with it in my conclusions.

24. On the merits issue, Ms Palin submits there are strong reasons why the claim in respect of either posting is very unlikely to succeed. She says the postings are not defamatory at all or, if they are, they are barely so and, in particular, the first does not meet the required threshold of seriousness for an action for libel: see Thornton v Telegraph Media Ltd [2010] EWHC 1414 (QB). In any event, the postings are clearly

comments on a matter of public interest. The postings are actually labelled "comments" on the web page and they are so described by the Claimant in her witness statement. Indeed, in the course of her submissions today, Ms Clift has described them in that way as well.

25. The first comment she says is self-evidently based on the facts set out in the relevant article and it is an opinion that an honest commentator could obviously hold on the facts of the case under discussion. Moreover, there is nothing she says to suggest either poster is or might be malicious: the Claimant does not suggest that either of these posters is malicious, nor is there any real prospect of proving that they did not honestly hold the views expressed. Proving absence of honest belief is an extremely high hurdle because of the importance of protecting and promoting freedom to comment. She refers in particular, to what was said by Lord Nicholls in Cheng v Paul [2001] EMLR 31 at [79] which was as follows:

> "Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence."

26. As for the second posting, Ms Palin submits it is plainly a comment on the other postings and in particular those (of a somewhat vitriolic nature) which appear to challenge the need for and efficacy of a Violent Persons Register. She draws my attention to a number of these other postings in that context. It is not necessary for me to set them out because there are a large number of them but she submits it is clear that the posters do not like the Violent Persons Register and it is that which "Chris Jones" is commenting on.

27. Moreover, in this context, she submits it is particularly important to have regard to the terms of the article on which "Chris Jones" was commenting because it is clear from the article itself that Ms Clift certainly did not issue any death threat or anything that could reasonably be so construed.

28. Ms Clift sets out in her witness statement in support of the application her reasons for bringing it. As I have said, she wishes to bring proceedings for defamation against the two posters and describes both as defamatory of her, even considering the positive context in which they were published and submits she has a strong claim.

29. In paragraph 3 of her witness statement, Ms Clift says this in relation to the "Bob" posting:

> "In their natural and ordinary meaning and in context the words meant and were understood to mean that I was a person who had frivolously caused vast amounts of public money to be wasted in the pursuit of my case. The words complained of are not true and are defamatory of me as I have never caused any public money to be spent in pursuit of the matter referred to, or in any other matter."

30. She goes on to say this in relation to the "Chris Jones" posting:

> "In their natural and ordinary meaning and in context, the words meant and were understood to mean that I was a person who had issued death threats against the council employees and accordingly criticised the 'attitudes' of those persons who had expressed support for me in such behaviour. The words complained of are not true and are defamatory of me as I have never issued death threats (or any words that may reasonably be construed as death threats) towards council employees or towards any other persons."

31. Ms Clift says that the concept of honest belief is not relevant because qualified privilege is unavailable as a defence, and that the postings cannot be construed as fair comment because they are not true. She says, moreover, that the website will have been read by many people, and the allegations made were offensive and distressing to her. The application she says is made to obtain vindication and a correction and because individuals should be held to account for defamatory comments posted anonymously. She submits in addition that the privacy rights of the individuals concerned must be considered in the light of the fact that the policy itself makes clear that defamatory matters should not be posted.

Conclusions

32. In my view, the postings are clearly one or two-liners, in effect posted anonymously by random members of the public who do not purport, either by their identity or in what they say, to have any actual knowledge of the matters in issue. It is difficult to see in the context, and having regard to their content, how any reasonable, sensible reader could take either of them seriously, or indeed how they could conceivably have caused any damage to the Claimant's reputation.

33. It is wholly unreal in my view, for example, to suppose that anyone will have read the postings, or gained access to them, detached from the very favourable and positive descriptions, including by the Claimant herself, in the substantive articles of what happened, and in particular of her vindication in the court proceedings. I note that the Claimant herself in correspondence described the Defendant's coverage of her case as excellent, careful and supportive.

34. The postings will therefore have been read in that context, as well as in the context of the positive contributions from the other posters, i.e. all the postings apart from those by "Bob" and "Chris Jones". It is to be noted that it would, of course, be necessary for the Claimant to invite the conclusion that the articles had been read, in order to establish a case that the words referred to her at all, since she is not mentioned by name in either posting.

35. This is relevant in particular in my judgment, to the second posting by "Chris" to which Ms Clift attaches such a seriously defamatory meaning. I do not accept any ordinary sensible reader could have understood it to bear the meaning she contends it does, in the context of the article and the postings as a whole; or as I have already indicated, having regard to the postings' nature and content. It is of course important to put the individual postings into their proper context, both with regard to the issue of meaning and for the purpose of considering what each was commenting on, as Ms Palin submits.

36. The postings are in reality, it seems to me, no more than "pub talk", as it has sometimes been described, and I consider it fanciful to suggest any reasonable sensible reader would construe them in any other way. See for example what was said in Smith v ADVN Plc [2008] EWHC 1797 (QB) at paragraph 17 where it was said by Eady J of what was posted on a bulletin board that "It is often obvious to casual observers that people are just saying the first things that come into their head and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious." (See in particular, paragraphs 14 to 17 of that decision).

37. There is, moreover, nothing to suggest that the Claimant has been, or conceivably might be the subject of a concerted and damaging campaign by either "Bob" or "Chris" of the nature considered by Owen J in Totalise. These postings appear to have been nothing more than a 'one-off'. Further, I note that both postings have now been removed from the website and it is material in this context that the Claimant herself only discovered them almost a year after they were posted while conducting an internet search, as she says in her witness statement, about the coverage of her libel action and the appeal which was brought following its conclusion.

38. In my judgment, therefore, when one considers the factors to which I have referred, the claims which this application is directed to advancing are weak and marginal at best, and ones which are highly likely to fail, quite apart from the prospective substantive defences which would probably be available of honest comment (because of the nature and nature of the postings themselves); and the material matters relating to that defence which I consider Ms Palin has correctly referred to and analysed.

39. Ms Palin refers in addition, in support of her submissions, to a potential lurking problem in relation to the issue of limitation. It might well be that if this application were granted and Ms Clift pursued her claims, as she says she wishes to, she could be faced with a limitation problem, but it is not necessary for the purposes of my decision to take that matter into account and I say no more about it.

40. I must also consider the rights and legitimate expectations of the website users in accordance with the considerations identified by Aldous LJ in Totalise as set out above.

41. In my judgment, these issues are engaged on the facts. Ms Palin points out that ANL's Privacy Policy states expressly that the poster's personal information will only be disclosed to third parties when consent has been obtained to such disclosure. It also provides that the personal information may be disclosed to comply with applicable laws. The potential disclosure to the Claimant of personal information of "Bob" and "Chris Jones" engages their right to a private life under Article 8 ECHR. It also constitutes processing for the purposes of the DPA and therefore must be compliant with the requirements of the DPA, i.e. the processing must be fair and lawful. These factors give rise to a legitimate expectation by the posters that their private information will not be disclosed to third parties without their consent. This is a factor which I must take into account. Albeit it might be said to carry less weight than might otherwise appear to be appropriate, having regard to the point raised by Ms Clift to which I have referred, namely the terms of the Policy itself which invites those who may post on the website to take attention of rule 5 which is that the postings should contain, "No libel or other abuse". Nonetheless, in the light of my conclusions set out

above, the rights and legitimate expectations of the website users arising from the Privacy Policy are matters which should be taken into account, as a factor relevant to the exercise of discretion in this case.

42. Taking all these matters into consideration I consider it would be disproportionate to grant the application and, in the exercise of my discretion for the reasons given, it is accordingly refused.

43. I should only add this. I am grateful to the parties and Ms Clift, who has dealt with this application in person, for the moderate and careful way in which their submissions have been advanced before me today.