Neutral Citation Number: [2022] EWHC 2726 (QB)

Case No: QB-2021-001248

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

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

Date: 26 May 2022

Before:

THE HONOURABLE MR. JUSTICE NICKLIN

- -

Between:

(1) SIMON BLAKE
(2) COLIN SEYMOUR
(3) NICOLA THORP

Claimants

- and -

LAWRENCE FOX

Defendant

- -

Heather Rogers QC and **Beth Grossman** (instructed by **Patron Law Ltd**) for the **Claimants**

Alexandra Marzec and **Greg Callus** (instructed by **Gateley Tweed LLP**) for the **Defendant**

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APPROVED JUDGMENT

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MR. JUSTICE NICKLIN:

1. I am today dealing with the consequential orders following my refusal of the Defendant's application for jury trial in a judgment handed down on 18 May 2022: [2022] EWHC 1124 (QB). The first issue I have to decide is the issue of costs relating to the application made by the defendant for trial by jury.

2. Ms. Marzec argues that the correct order should be the Claimants' costs in the case. She does so, principally, on the basis that those costs should be viewed as relating to case management issues. She contends that it was an appropriate application to bring. It had novel features and was based on a concern that the trial would be seen to be fair if the Judge was required to consider the Equal Treatment Bench Book. Ultimately, I have rejected those arguments.

3. Ms. Rogers argues there is nothing to take this out of the norm and therefore to justify a departure from the usual order as to costs. The application was self-contained and the ultimate outcome of the litigation as a whole cannot have a bearing on this discrete issue. It is not like orders for costs made following the trial of preliminary issues, where the court is mindful of the fact that it has accelerated a determination of the preliminary issue, which, had the issue been determined at trial in the usual way, the "event" may have been determined by the overall result of the action. Ms. Rogers says this is different. This was a self-contained application. It has failed. The usual order should apply. The Defendant should pay the Claimants' costs of the application. Ms. Rogers also submits that, when this matter was first raised before the Senior Master, the Senior Master expressed doubt in her judgment as to whether or not any application before a jury trial was likely to succeed. The Defendant pressed on in any event.

4. I agree with Ms Rogers' submissions. In my judgment, this is a self-contained application. The result of the application will have no bearing on the result of the litigation, and vice versa. It is like any other application that is made in the course of proceedings. In the usual way that the court approaches the question of determination of costs of the application by considering the particular circumstances in which it was made. I think it will be fair to say, and in this respect I am echoing what the Senior Master said, that this was an ambitious application, having regard to the effective abolition of jury trial in defamation claims by the Defamation Act of 2013. That is not to say that a party cannot make an application for trial by jury trial, but if s/he does, it comes with the risk that, if it fails, the party will be ordered to pay the costs of the application. There is nothing unusual – or unfair – in that.

5. In my judgment, it is also right to have regard to the fact that, in this case, the application for jury trial has caused significant disruption to the process of this litigation. It has caused delay to the proper progression of the claim, which would have been avoided had the application not been made. The Court can expect parties to take a reasonable and sensible approach to the applications that they make in the litigation. There is no suggestion that this application was totally without merit. As I say, it was ambitious and, ultimately, it has failed. In my judgment, the correct order to make is that the Defendant must pay the Claimants' costs of the mode of trial application.

For proceedings, see separate transcript

MR. JUSTICE NICKLIN:

6. I need to give a short ruling on a point that although short, is important. It concerns the directions for the determination of the natural and ordinary meaning of a publication as a preliminary issue. That has led to a discussion as to the parameters of admissible evidence on that issue.

7. The point arises today because there has been a continuing discussion about directions for the resolution of meaning as a preliminary issue in this case, both in relation to the claim and the counterclaim. In submissions today, it has been submitted by the Defendant that the Court should direct disclosure on the issue of the context in which the relevant Tweets appeared. A possibility has raised that there may be a need for third-party disclosure from Twitter, even potentially a need for expert evidence.

8. I am going to refuse to give such directions because, as a matter of law, any evidence that would be produced as a result of that exercise is not admissible on the determination of the issue of natural and ordinary meaning of a publication.

9. The background to the case is set out in the judgment handed down on 18 May 2022. It is a well-established principle of defamation law that a publication bears a single natural and ordinary meaning. This is the so-called 'single-meaning rule'. Over the years the single meaning rule has been the subject of criticism, but it undoubtedly endures. Indeed, it can be fairly said to be an embedded principle of the common law, not only in this jurisdiction but in other Commonwealth jurisdictions.

10. In ***Slim -v- Daily Telegraph*** **[1968] 2 QBD 157, 171-172** Diplock LJ said that the single-meaning principle was, "*beyond redemption by the courts*". In ***Bonnick -v- Morris*** **[2003] 1 AC 307**, Lord Nicholls observed [21]:

> "The 'single meaning' rule adopted in the law of defamation is in one sense highly artificial, given the range of meanings the impugned words sometimes bear: see the familiar exposition by Diplock LJ in ***Slim -v- Daily Telegraph Ltd,*** **171-172**. The law attributes to the words only one meaning, although different readers are likely to read the words in different senses. In that respect the rule is artificial. Nevertheless, given the ambiguity of language, the rule does represent a fair and workable method for deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reasonable reader would give the words is unexceptionable."

11. More recently, in ***Stocker -v- Stocker*** **[2020] AC 593** Lord Kerr said this about the single-meaning rule:

> [33] The almost complete abolition of jury trial meant that the task of choosing a single meaning fell to the judge alone. The exercise of choosing a single immutable meaning from a series of words which are capable of bearing more than one has been described as artificial - see, in particular, Diplock LJ in ***Slim -v- Daily Telegraph Ltd*** **[1968] 2 QB 157, 172C**. But the single meaning rule has had its robust defenders. In ***Oriental Daily Publisher Ltd -v- Ming Pao Holdings Ltd*** **[2013] EMLR 7**, Lord Neuberger of Abbotsbury, sitting as a judge of the Hong Kong Court of Final Appeal, said at [138] that the criticism of the rule's artificiality and (implicitly) its irrationality was misplaced. He suggested that the identification of a single

> meaning to be accorded a statement arose "in many areas of law, most notably … the interpretation of statutes, contracts and notices": [140].
>
> [34] Whether the analogy between a single defamatory meaning and a sole meaning to be given to a contractual term, statutory provision or notice is apt (which I take leave to doubt), it is clear that the single meaning approach is well entrenched in the law of defamation and neither party in the present appeal sought to impeach it. And, whatever else may be said of it, it provides a practical, workable solution. Where a statement has more than one plausible meaning, the question of whether defamation has occurred can only be answered by deciding that one particular meaning should be ascribed to the statement.

12. The Supreme Court then went on to recite the familiar principles by which the court adjudicates a determination of that single, natural ordinary meaning.

13. A corollary to the single meaning rule, and an equally well-established principle, is that determination of the natural and ordinary meaning is a wholly objective exercise. The meaning is that which the notional, hypothetical, ordinary, reasonable reader would understand the publication to bear. The admissible evidence on the determination of the natural and ordinary meaning is usually limited to the publication itself. In some limited cases, it can extend to extrinsic evidence, for example, of what a reader would have discovered if s/he had followed hyperlinks that were included in the publication.

14. How the words were *actually* understood by those who read them is not relevant for determination of the single natural and ordinary meaning. That is not to say that the impact on the publication is not important. It has always been relevant to the issue of damages and is now particularly relevant to the issue of whether the claimant can demonstrate that the publication complained of meets the requirements of serious harm under s.1 Defamation Act 2013.

15. The evidential enquiry which the Defendant proposed to conduct, and which the proposed directions were designed to support, was purportedly to establish the "*context*" in which the relevant Tweets would have appeared to readers. It is well-established that the natural and ordinary meaning of a publication must be ascertained having proper regard to the context in which it appeared: ***Stocker***. However, there are limits to what is admissible as context. It does not extend to context that would vary reader by reader. Such a publishee-specific inquiry *may* be relevant to damages/serious harm, but it is neither relevant to, nor admissible in, the determination of the natural and ordinary meaning.

16. In the objective assessment of the natural and ordinary meaning, the context relevant to this exercise must be the context in which the publication appeared to the notional ordinary, reasonable reader. The principles are set out fully in ***Riley -v- Murray*** **[2020] EWHC 977 (QB)** [12]-[18]. That was a Twitter case, and it led me to observe [28(v)]:

> "The Tweet was self-contained and stood alone. It would have appeared - and been read - on its own in the timelines of the Defendant's followers. What appeared in the immediate context in the timelines of the Defendant's followers would have depended entirely on who else each of them followed. In that respect, Twitter is perhaps one of the most inhospitable terrains for any argument based on the context in which any particular Tweet appeared in a reader's timeline."

17. Put shortly, therefore, in the determination of natural and ordinary meaning of the Tweets, it is neither necessary nor appropriate to embark on the exercise of attempting to ascertain how *particular* readers would have seen relevant Tweets. In accordance with the established principles, when determining the natural and ordinary meaning, the focus for the court will be on the publication of the individual Tweets and the immediate context available to the notional ordinary reasonable reader.

18. Some of the Tweets that are complained of in these proceedings quote-Tweeted another Tweet. That will, of course, be part of the relevant context by which the court judges the meaning. If there has been a response to a Tweet, and if the evidence demonstrates that the response would have appeared with the original Tweet and was to *all* readers, then that will be properly admissible as context.

19. However, as is made clear in the passages I have quoted from ***Riley***, to be admissible as context, it has to be material that was available to *all* readers. Attempts to partition the readership, or to group to them into particular categories, and to say that some people would have seen the Tweet in *this* particular way, other people would have seen the Tweet together with *this* material is impermissibly to cross the divide between natural and ordinary meaning and the law's treatment of innuendo meanings.

20. Mr. Callus has referred me to parts of the Defendant's case on context set out in the Defence. In paragraph 29 it says this:

> "The Defendant's publication of the Responsive Tweets will have appeared to different readers in different contexts which are relevant to the way in which they would have been read and understood by the ordinary reader. Publishees would have viewed and read the Responsive Tweets (or one or two of them) in one of at least five ways, as follows:
>
> (1) First, those persons who visited the Defendant's Twitter Profile Page (http://twitter.com/LozzaFox) following the publication of the Responsive Tweets would have seen one, two or three of them, depending on the time at which those persons visited the page.
>
> (2) Second, those who follow the Defendant on Twitter (approximately 239,000 followers on 4 October 2020), had they viewed Twitter shortly after the publication of the Responsive Tweets, would have seen them in their timelines ("Follower Publishees"). The order in which they appeared would depend on the algorithmic settings they use to organise their timeline (arranged by Twitter's assessment of importance/relevance by choosing 'Top Tweets First' ("TTF"), or arranged reverse chronologically by choosing 'Latest Tweets First' ("LTF").
>
> (3) Third, some Twitter users who do not follow the Defendant would have seen the Responsive Tweets (or some of them) because one or more of the Responsive Tweets was quote-tweeted or re-tweeted into their timelines ("Non-Follower Publishees") by a person that they did follow ("the Secondary Publisher"). These people would have seen the Responsive Tweets in one of two ways:
>
> (a) If the Secondary Publisher simply re-tweeted the Responsive Tweet, it would appear in its original format in the timeline of the Non-

Follower Publishee in the same form as it would appear to a Follower Publishee, namely the Responsive Tweet with the relevant Racism Tweet embedded.

(b) However, if the Secondary Publisher quote-tweeted the Responsive Tweet, it would appear in modified format in the timeline of the Non-Follower Publishees with the Secondary Publisher's comment appearing first, and the Responsive Tweet and the relevant Attack Tweet embedded below.

(4) Fourth, some people who do not use Twitter will have seen the Responsive Tweets (whether quoted, or by way of images) republished in the media."

21. That serves as a useful example of what could be readily referred to as partitioning of the readership. It can be done, and it is, as I have said, particularly relevant when one comes on to look at the actual harm caused by publications and the actual context in which words appeared. The *actual* meaning that individual readers understood a particular publication in the specific context in which it was presented to them, is of course a highly relevant material factor when the court is considering serious harm to reputation and ultimately if it arises the question of damages. It does not arise in – and it is not relevant to - the determination of the single natural and ordinary meaning.

22. I really need go no further. The principle is clear and well established. But, even if this evidence were admissible, it would be impossible to set a principled limit on the categories of readership. If it is open to a defendant to identify categories of reader, and to argue that the context in which they would have read the relevant Tweet means they understood it in a different way, then that approach would be open to a claimant too. Mr Callus submitted that these are sub-categories of "*ordinary reasonable readers*" and each category may understand the relevant Tweet to bear a different meaning. The short answer is that the meaning that each category of readership understands the words to bear, because of their knowledge of extrinsic material (i.e. different context), is not a natural and ordinary meaning, it is an innuendo. This demonstrates the importance of holding firm the line between natural and ordinary meanings and innuendo meanings in the law of defamation law.

23. It is a principled and clear distinction. I do not consider that it produces unfairness. The natural and ordinary meaning is just one of the things that needs to be resolved in a defamation case. If it is resolved against a claimant, for example, the meaning is found not to be defamatory, then that would be the end of the case. If the publication is found to bear a natural and ordinary meaning defamatory of the claimant then the case would continue, but there would be important further considerations before a defendant would be found liable. As regards the meaning that the words were *actually* understood to bear, most importantly the issue of serious harm under s.1 Defamation Act 2013.

24. Those matters that have been advanced in paragraph 29 of the Defence would potentially become highly material to the issue of serious harm. If, the natural and ordinary meaning that the Court finds the publication to bear is not actually the meaning that the publishees understood the words to bear, then the Claimants may fail to satisfy s.1.

25. At this stage, however, and applying the principles that are clearly established in defamation law, the limits of context are as they are clearly stated in ***Riley -v- Murray***. In order to be admissible as context, the relevant material has to have been available to readers. It is only that material that can be considered in determining the single natural and ordinary meaning that a publication would be understood to bear by the notional, ordinary, reasonable reader.

26. For those reasons and subject to those parameters, I make no directions for disclosure or (potentially) expert evidence. There will be no investigation, at this stage, as to the way in which a Tweet appeared to particular categories of readers. Those are matters, if they arise for determination, will be investigated and resolved later in the proceedings. However, the parameters of the exercise that we are going to embark upon next are as I have set out.

For proceedings, see separate transcript

This judgment has been approved by Nicklin J.