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Case No: QB/2003/APP/0199

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date 7 April 2003

B e f o r e :

THE HONOURABLE MR JUSTICE GRAY

Between:

DAME DIANA RIGG	**Claimant/Respondent**
-and-	
ASSOCIATED NEWSPAPERS LIMITED	**Defendant/Appellant**

Desmond BROWNE QC and William BENNETT (instructed by Harbottle & Lewis, Solicitors) for the Claimant
Miss Adrienne PAGE QC (instructed by Reynolds Porter Chamberlain, Solicitors) for the Defendant

Hearing dates: 28 March 2003

HTML VERSION OF JUDGMENT APPROVED

Mr Justice Gray:

Introduction

1. .This is an appeal by the Defendant, the publisher of The Daily Mail, from an order made by Master Whitaker on 12 March 2003, whereby he ordered disclosure of the notes of the Defendant's journalist, Ms Jane Kelly, who interviewed the Claimant, Dame Diana Rigg in September 2002. The appeal raises questions as to the entitlement of a claimant, who has received an offer of amends from a defendant, to obtain disclosure of documents in order to decide whether or not to accept the offer.

The background

2. .Following the interview of the Claimant by Ms Kelly, there was published in the issue of The Daily Mail for 19 September 2002 an article headed "Diana Rigg attacks British men - and announces her retirement: my husband's affair with Joely Richardson left me mourning for years. Now I'm finished with marriage and men". The article, which occupied a full page of the newspaper, contains extensive quotations attributed to the Claimant.

3. .Complaints about the article were made straightaway by the Claimant and by the person who had accompanied her to the interview. Those complaints elicited from the newspaper a conciliatory response. Nonetheless the Claimant instructed solicitors, whose letter dated 26 September 2002 indicated that proceedings for defamation and malicious falsehood would be commenced unless suitable terms of settlement were offered. The letter complained that the newspaper article had

attributed to the Claimant statements which she had not made in the course of the interview. In its reply of 9 October 2002 the newspaper repudiated the suggestion that it had misreported what the Claimant had said during the course of the interview. The letter referred to "comprehensive notes" made by Ms Kelly during the interview.

4. .Shortly afterwards these proceedings were commenced. The Claimant alleged that the article was defamatory of her in suggesting that she had chosen to reveal herself in public as a lonely, embittered, rejected and vengeful woman, by giving an interview to a mass-circulation tabloid for the purpose of attacking British men and publicising her bitterness about her husband's adultery and her failed marriage, and about not having a man in her life. In support of her claim to aggravated damages, the Claimant alleged at paragraph 10.8 that the article deliberately gave the false impression that it was based upon an interview given by the Claimant about her private life. It was further alleged in the Particulars of Claim at paragraph 10.9 that the article included a number of deliberate falsehoods, which included false attributions of quotations to the Claimant. The pleading also included a claim that the words were published maliciously, in that amongst other things the Defendant falsely claimed that during the interview the Claimant had made statements she had not in fact made. The good faith of the journalist was plainly put in issue by the Particulars of Claim.

5. .The response of the Defendant was to make by letter dated 12 February 2003 an offer of amends under section 2 of the Defamation Act, 1996. The offer was to make a suitable correction and a sufficient apology, to publish the correction and apology in the newspaper and to pay to the Claimant such compensation (if any) and such costs as might be agreed or determined to be payable. In connection with that offer, the Defendant through its solicitors stated that they were satisfied that Ms Kelly had not written "deliberate falsehoods" and that this was supported by her contemporaneous notes. The letter went on to express the belief that it would be of value to the Claimant to have the opportunity to consider Ms Kelly's account together with her notes, which could be swiftly arranged "once the parties have agreed to go down the offer of amends route". The Defendant said much the same thing in a later letter of its solicitors dated 19 February 2003. The attitude being adopted by the Defendant was therefore that the Claimant could have access to the journalist's notes but not until after she had accepted the offer of amends. Acceptance of an offer of amends deprives a claimant of the opportunity of a jury trial.

6. .The Defence was served on 19 February 2003. Since an offer of amends had already been made, it did not and could not contain any substantive defence. Nonetheless it runs to 30 pages. There is some force in the suggestion made by Mr Browne QC for the Claimant that in effect the defences of consent and justification are being put forward under the guise of rebutting the Claimant's case on malice. It is to my mind doubtful whether a pleading of that kind is consistent with the policy which underlies the offer of amends provisions of the 1996 Act, namely to enable a publisher who has made an error to recognise his fault and to extricate himself from the proceedings rapidly, economically and amicably. As Eady J observed in Milne v. Express Newspapers (29.11.2002) at paragraph 41:

> "The main purpose of the statutory regime is to provide an exit route for journalists who have made a mistake and are willing to put their hands up and make amends".

To similar effect was the comment of the same judge in Cleese v. Associated Newspapers (6.2.2003) at paragraph 19:

> "It is fair to say, perhaps, that the whole of the 'offer of amends' regime is predicated upon the parties' willingness to negotiate meaningfully and thus to give and take, where necessary, in order to achieve a reasonable compromise as quickly and inexpensively as the circumstances permit".

7. .As to the terms of the Defence it sets out at some length and in some detail and in quotation marks the words which the Defendant contends were spoken by the Claimant in the course of the interview. The allegation that the article included deliberate falsehoods is denied, as is the allegation that the Defendant was malicious.

8. .There followed a series of letters in which the Claimant's solicitors sought unsuccessfully to obtain from the Defendant a copy of Ms Kelly's notes. On 5 March 2003 the Claimant made application to the

Master for an order for their disclosure.

The decision of the Master

9. .The Master acceded to the application for an order for the disclosure of the journalist's notes. He did so pursuant to CPR 31.14, which is in the following terms:

> "(1)A party may inspect a document mentioned in
>
> (a) a statement of case;
>
> (b) a witness statement;
>
> (c) a witness summary; or
>
> (d) an affidavit".

10. .Having summarised the material paragraphs in the pleadings, and accepting that there would at trial be a considerable dispute whether the words attributed to the Claimant in the article were actually said by her, the Master concluded:

> "It seems to me plain that the document in this case has been mentioned in the pleading by being extensively quoted in it. The Defendants have taken the opportunity to put very much in the face of the Claimant the issue that the notes are accurate by citing them at great length in the pleading... In those circumstances, in my judgment they now cannot be heard to say, well having done that, this does not come within CPR Part 31.14 because this is not mentioning the document in question".

Disclosure pursuant to CPR 31.14

11. .The first question which I have to decide is whether the Master was correct to say that the journalist's notes were "mentioned" in the Defence, so as to give rise to the right to inspect under part 31.14. The short point taken by Miss Page QC for the Defendant is that quoting from a document, however extensively, is not the same as mentioning that document. She accepts that the notes have been referred to in correspondence but argues that mentioning documents in correspondence does not trigger a right to inspect under CPR 31.14. She relies on a passage at paragraph 7.09 in Matthews & Malek on Disclosure (2nd Edition):

> "Under the CPR, the rule is no longer whether 'reference is made' to the document. What now matters is whether it is 'mentioned' in the larger document. The deliberate change in wording, coupled with the reductivist philosophy behind the Woolf reforms, suggests that it is the intention significantly to reduce the scope of this rule. It is therefore submitted that a document is not 'mentioned' in another unless the reference to it is specific and direct. Thus mere reference to a transaction which (to be effective in law) must have been carried out by a document in writing would not be sufficient: the document itself would not be mentioned".

Miss Page also relies on Atkins' Civil Procedure Volume I paragraph 326:

> "The use of the word 'mentioned' suggests that a specific and direct reference to a document will be required so that its existence is disclosed, thus giving rise to the right to inspect".

12. .Mr Browne for the Claimant urges me to adopt a purposive construction to CPR 31.14 and to have regard to the desirability of openness in litigation which exists under the new regime. He relies on Quilter v. Heatly [1883] 23 Ch D 42 in which case Lindley LJ said at page 50 that the evident intention of the predecessor to CPR 31.14, was "to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings". He relies also on a similar observation by Slade LJ in Dubai Bank v. Galadari (2) [1990] 1 WLR 731 at 737H.

13. .I cannot accept that Ms Kelly's notes were "mentioned" in the Defence within the meaning of CPR 31.14. There is no reference in the Defence to the notes as such and certainly no direct and specific reference. That is stated to be a requirement in Quilter. I note that in his judgment in Dubai Bank Slade LJ at page 739A said that what was required was the making of a "direct allusion" to a document or documents. It does not appear to me that quoting from a document amounts to mentioning or directly alluding to it. I therefore conclude that the Master was wrong to have made an Order for the disclosure of the notes pursuant to CPR 31.14.

CPR 31.12: An alternative ground of disclosure?

14. .But that is not necessarily an end of the matter. Mr Browne argues that, even if the Claimant is not entitled to disclosure under CPR 31.14, an Order for disclosure should now be made under CPR 31.12. Miss Page points out that the requisite respondent's notice seeking to uphold the decision of the Master on a different ground has not been served. Nor it has. But it seems to me pointless and contrary to the overriding objective to require the Claimant to issue a fresh application notice. Whilst there may be a point to be taken on costs, I think it right to consider whether an entitlement to disclosure is made out under CPR 31.12.

15. .That rule is in the following terms:

> "(1) The court may make an order for specific disclosure or specific inspection".

There is no indication that there is any limitation as to the stage during the proceedings when such an application may be made. The notes simply say that the application should be made in accordance with Part 23. It appears to me that I have a discretion, even at this early stage of the proceedings, to make an order for disclosure under CPR 31.12. I accept, however, that the burden is on the Claimant to make a clear case for her entitlement to accelerated disclosure, that is, disclosure earlier than would normally take place.

The offer of amends machinery

16. .In order to decide whether the Court should exercise its discretion to make an order for disclosure under CPR 31.12, it is first necessary to set out the material parts of the provisions about acceptance and failure to accept offers of amends.

> "3(1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.
>
> (2)The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.
>
> (3)If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed.
>
> (4)If the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer may take such steps as he thinks appropriate, and may in particular
>
> > (a)make the correction and apology by a statement in open court in terms approved by the court and
> >
> > (b)give an undertaking to the court as to the manner of their publication.
>
> (5)If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings...

4(1) If an offer to make amends under section 2, duly made and not withdrawn, is not accepted by the aggrieved party, the following provisions apply.

(2) The fact that the offer was made was is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against the person making the offer.

A qualified offer is only a defence is respect of the meaning to which the offer related.

(3) There is no such defence if the person by whom the offers were made knew or had reason to believe that the statement complained of

(a)referred to the aggrieved party or was likely to be understood as referring to him and

(b)was both false and defamatory of that party;

But it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case..."

17. .For present purposes the point to note is that, where an offer of amends is made but not accepted, the fact that the offer was made is a defence unless the person by whom the offer was made (usually the defendant) knew or had reason to believe that the statement was both false and defamatory of the aggrieved party (the claimant).

18. .It seems plain beyond argument (and Miss Page did not argue the contrary) that Ms Kelly's notes will have an important bearing, one way or another, on the question whether the Defendant knew that the words complained of were false and/or defamatory. That issue is raised in uncompromising terms in the Particulars of Claim and is dealt with at length in the Defence.

19. .So the notes bear directly on an issue raised by the pleadings. (I should add that Miss Page placed some reliance on the fact that no Reply has been served, suggesting that the Claimant is hesitant about doing so. But I do not think I should attach much significance to this since I am told that time for service of the Reply has not yet started to run. Besides the issue to which the notes are relevant is clear on the pleadings already exchanged). The question is then whether an order for disclosure of the notes should be made at this early stage. Miss Page argues that disclosure now would be premature and inappropriate. It would, she says, be wrong and unfair to the Defendant for the Court to give the Claimant the advantage of early disclosure, just as it would be wrong to make an order for disclosure against a claimant in a libel action in order to enable the defendant to fish for a defence of justification: see Granada Television Limited v. Newsgroup Newspapers Limited (30 July 1999). Miss Page relies also on the observation of Eady J in Milne v. Express Newspapers at paragraph 28:

"It is necessary to remember, however, that the legislature intended that those who make offers of amends should only be deprived of the defence in the event of bad faith or (if it is different) if they had positive grounds to believe the falsity of what they asserted. That is a serious matter and it cannot, as a matter of general principle, be permitted to enter a pleading on a purely formulaic basis in the hope that something further may be 'fished' up in the course of disclosure".

20. .Miss Page also asserts that a point of principle is involved: so long as the allegation remains hanging over the head of Ms Kelly that she has been guilty of deliberate falsification, the Claimant should not be permitted to use the disclosure process in order to unearth evidence which may support her allegation.

21. .I am not convinced that the present application does raise any point of principle. It has to be borne in mind in any case that the Claimant was present at the interview. The allegation of deliberate false attribution is already raised on the face of the preliminary pleadings, as is the charge of malice. This is not therefore a case of a claimant seeking disclosure on the off chance that something may turn up. The

notes exist (and have been referred to by the Defendant many times in correspondence) and are relevant to an issue already raised in the pleadings.

22. .Mr Browne is candid about the reason why his client wants disclosure now: the Claimant wants to make an informed decision whether or not to accept the offer of amends. The notes may have an important bearing on whether the Claimant can discharge the burden of proving the guilty knowledge required by section 4(3) of the 1996 Act. The decision is of importance to the Claimant because, by accepting the offer of amends, she would be forfeiting what would otherwise be her right to a trial with a jury. Although it is open to the Claimant to press on with the action and obtain disclosure of the notes in some months' time, that, it is suggested, might turn out to have been pointless and would be both time-wasting and disproportionately expensive.

23. .There is no authority which bears directly on the entitlement of a claimant to obtain disclosure in order to decide whether or not to accept an offer of amends. However, in Abu v. MGN Ltd (7.11.2002) Eady J, having referred to the modern "cards on the table" approach to litigation generally, continued at paragraph 10:

> "By the same token, if an offer of amends has been made, whether on a qualified or unqualified basis within the meaning of section 2(2), the complainant would no doubt like to know, before accepting it, if his reputation is going to be further undermined during the court process".

One way of enabling the claimant to know, before accepting the offer of amends, if her reputation is going to be undermined during the court process (by the deployment by the Defendant of their reporter's notes) would be to make a disclosure order now.

24. .In my judgment the circumstances of the present case do require me to make an order for disclosure of Ms Kelly's notes at this point pursuant to CPR 31.12. I accept the submission of Mr Browne that the Claimant has every reason to want to know now whether Ms Kelly's notes support or undermine her case. Since, as Miss Page expressly accepts, the notes would be disclosable hereafter whether or not the offer of amends is accepted, I see no sense in postponing the time when disclosure has to be made. The Defendant has relied extensively and heavily on the contents of the notes both in correspondence and in its pleadings. Yet the Defendant persists in a refusal to disclose the notes until after the offer of amends has been accepted. In the circumstances of the present case it seems to me to be fair, reasonable and in accordance with the overriding objective that the Claimant should have the opportunity to inspect the notes now. Accordingly I order their disclosure pursuant to CPR 31.12.

25. .I do, however, add this rider: for the reason which I have endeavoured to explain, I think it right that this Claimant should have access to a single identified and specific document because it is relevant to a pleaded issue and highly material to the decision whether or not to accept the offer of amends. Moreover the Defendant has relied heavily on the existence and contents of the document. The decision in the present case should not be treated as approving on a routine or wide-scale basis applications for disclosure by claimants faced with a decision whether or not to accept offers of amends.