

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
The Strand
London, WC2A

Wednesday, 4 November 2015

BEFORE:

MR JUSTICE WARBY

BETWEEN:

PETER REYNOLDS

Claimant

- and -

CHRIS BOVEY

Respondent

MR MICHAEL POLAK appeared pro bono on behalf of the Claimant

Proceedings

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(11.18 am)

MR POLAK: Your Lordship --

MR JUSTICE WARBY: Yes, Mr Polak.

MR POLAK: -- I appear pro bono behalf of Mr Reynolds.

MR JUSTICE WARBY: That's Mr Reynolds behind you, is it?

MR POLAK: It is, my Lord.

MR JUSTICE WARBY: Mr Reynolds, do move over so that I can see you and you can see me.

MR POLAK: Your Lordship, if I could ask him to sit next to me.

MR JUSTICE WARBY: Yes, that will be fine. Yes.

MR POLAK: I will be seeking his assistance at times.

MR JUSTICE WARBY: Yes.

MR POLAK: We do apologise for the perhaps haphazard way by which documents have come before you.

MR JUSTICE WARBY: Well, yes, haphazard is a bit of a polite description, but can we just establish where we are procedurally, because I want to make sure that I get this clear. Master Eastman struck the case out whatever that was, in January 2014.

MR POLAK: Yes.

MR JUSTICE WARBY: A late application for permission to appeal was brought and an extension of time was granted by Mr Holroyde, but then he threw it out on the merits nearly a year ago, on 20 November 2014.

MR POLAK: Your Lordship, that's how I understand it.

MR JUSTICE WARBY: Somehow it's taken a year for this renewal to come on. No one seems to be taking a procedural point about that. Are you able, though, to explain why it's taken that long?

MR POLAK: Your Lordship, if I can take instructions on that. (Pause). Your Lordship, Mr Reynolds --

MR JUSTICE WARBY: I think I heard most of that. It's a administrative mess up by the sound of it, letter not received or acknowledged or acted on.

MR POLAK: Yes, as I understand it. Yes.

MR JUSTICE WARBY: Well, no one's taking a point about it, so that's just for my information, so that I could understand why we're here now. Now, next point is I only got this bundle, which may or may not be helpful, at ten to eleven.

MR POLAK: Your Lordship, yes.

MR JUSTICE WARBY: I was doing other things. What efforts had been made before that to comply with the practice direction on filing an appeal bundle?

MR POLAK: Your Lordship, we have had some problems with getting all the paperwork together. Mr Reynolds has had another matter last week in this court which he has been concentrating his attention on. So we do apologise for that. He is in effect self-representing, although I speak for him as --

MR JUSTICE WARBY: Well, I understand that, but, as you know, the rules require that an appeal bundle should be filed within 35 days of the appellant's notice and that, whenever it was, was over a year ago.

MR POLAK: Your Lordship, Mr Reynolds did file a skeleton some time ago.

MR JUSTICE WARBY: In June of 2014.

MR POLAK: Yes, my Lord.

MR JUSTICE WARBY: That he had do.

MR POLAK: He didn't file a final -- he didn't know that that was needed. Your Lordship, he tells me he didn't know until quite recently that this hearing was going to take place.

MR JUSTICE WARBY: Well, that's not the point. The point is that there should have been a bundle filed before the matter came before Mr Justice Holroyde. If the skeleton argument went in in June, that must have been the latest time at which the bundle should have been filed.

MR POLAK: Your Lordship, Mr Reynolds tells me that he must have filed a bundle at that time.

MR JUSTICE WARBY: Well, I've got the court file here, or what I believe to be the entire court file, and there's no bundle. Presumably the reason for this is that there was no bundle.

MR POLAK: He does accept the problems that that caused. He wasn't seeking to not comply with any requirements. He only find out that --

MR JUSTICE WARBY: Well, it's not really a question of him seeking not to comply, but whether he was seeking to comply. The Civil Procedure Rules are available to anyone who cares to look on the internet by putting in the word Civil Procedure Rules and that's a free service that you can get access at any library in the country.

It's not very difficult. There's a section on appeals and there's a section devoted to appeals of this kind. Right. Okay.

There's more than a procedural significance to that, it seems to me, because the next point is what are the grounds of appeal and, as I understand it, the grounds of appeal are the ground that were filed by Mr Reynolds on 28 February 2014. They're the two grounds that Mr Justice Holroyde dealt with five months after this, on 20 November. They're quite short and they're also the ones that counsel for the respondent has dealt with in the skeleton argument which I hope that you've seen in response to the present application and those are and remain, as I understand it, the grounds of appeal with no application to amend and the difficulty that I have in reading your skeleton is it doesn't seem to address those grounds. It seems to put forward different grounds.

MR POLAK: Your Lordship, yes, and he cites article 6 for the first ground and article 17 for the second.

MR JUSTICE WARBY: Yes. That's how the matter was dealt with by Mr Justice Holroyde in the decision which you're asking me to revisit.

MR POLAK: My grounds do touch on the article 6 point.

MR JUSTICE WARBY: They do. That's paragraph 8 on page 5.

MR POLAK: Yes, your Lordship. Yes.

MR JUSTICE WARBY: And I suppose in D, D2, you cite article 6. Do you want me to address a broader set of grounds as set out in this the skeleton argument that I first saw today. I don't know whether it had been provided sooner than that.

MR POLAK: Your Lordship, yes. I would ask that you do that on the basis that, although Mr Reynolds gave a good shot at drafting grounds himself, they didn't perhaps set out exactly what the possible problems with the decision were.

MR JUSTICE WARBY: Right. Do you want me to take into account material in this bundle which I got today?

MR POLAK: The material in the bundle is the material referred to in Mr Reynolds' witness statement.

MR JUSTICE WARBY: Witness statement dated 31 October, is it?

MR POLAK: That's correct, yes.

MR JUSTICE WARBY: That should be the date on the bundle. Right, so that's Saturday. Am I right in thinking that the skeleton argument was lodged today?

MR POLAK: Yes, very early today.

MR JUSTICE WARBY: And the bundle has first been provided to the court today?

MR POLAK: Your Lordship, yes.

MR JUSTICE WARBY: Okay. Well, you've got another 15 minutes to advance your grounds of appeal. I will not decide whether to permit you to advance those grounds. I will let you argue them and then I'll reach a conclusion on whether it's right to allow you to rely on them.

MR POLAK: Thank you, your Lordship.

If I may begin by referring to the effects that these incidents have had on Mr Reynolds as set out in his witness statement at paragraph 19. I do that solely to put before the court that this isn't for Mr Reynolds something trivial. It is something which has had person costs as well as professional costs to him.

MR JUSTICE WARBY: Yes.

MR POLAK: Nor is it something which has finished. Comments received last night to his website accused him or -- if I may hand them up to your Lordship.

MR JUSTICE WARBY: Right.

MR POLAK: Your Lordship, that comment of course is not part of these proceedings. I put it before you because the court, if an appeal was allowed, may consider where the equity falls between Mr Reynolds and Mr Bovey and I ask you to take into account the statement of Master Bard at exhibit 28. Master Bard heard an identical claim against an associate of the respondent in this claim and at paragraph 4, where halfway down he states:

"The defendant contends the claimant has directed a tirade at him."

And he says:

"I'm bound to say that I have seen no evidence at all of this and that the way in which the claimant has expressed himself he seems to have been surprisingly temperate, given the nature of the allegations that have been published against him."

MR JUSTICE WARBY: Yes.

MR POLAK: In my submission, there is no evidence at all of any poor conduct apart from perhaps not fully understanding procedural rules on behalf of Mr Reynolds, whereas in my submission the same cannot be said about the respondent in this case.

I turn to the grounds, paragraph 3A and if I may ask you to consider the defamatory statements which are at tab 4 and 5, appended to the particulars of claim.

MR JUSTICE WARBY: Well, then I have a problem. That's tab 4, tab 4 and tab 5 are completely empty in my bundle.

MR POLAK: When we arrived, I did hand two tabs to your associate.

MR JUSTICE WARBY: Right. Are those are the documents? Okay. Right. Thank you. I have to say, I've not seen these documents until this moment.

MR POLAK: Yes. Your Lordship, we apologise for that.

MR JUSTICE WARBY: In an attempt to challenge a decision of January 2014. So what am I to put where? Is it the exhibits in tab 5 and the particulars of claim in tab 4.

MR POLAK: Yes, your Lordship.

MR JUSTICE WARBY: I've got a lot of screenshots.

MR POLAK: Yes, your Lordship.

MR JUSTICE WARBY: I've got particulars of claim, which are seven pages long, and we're then screenshots numbered 1 to something. That's our file.

MR POLAK: That's correct. Your Lordship, I don't intend to refer to each statement. All that I intend to highlight before the court is that the statements is comments beneath them, so it's clear that people have seen them and read them and they have been liked on occasion as well, so it is clear that people have read and seen these statements.

So my first point, your Lordship, would be the appeal would have an real prospect of success, given, in my submission, the unclearness about whether posts on a private Facebook page will constitute publication. As I understand it, in a recent case of *Walder v Smith*, which is going to appeal, private Facebook posts on a private page were held to constitute publication. I don't wish to fully make out that point now. My submission is simply that there is a prospect of success in regards to the actual law which was applied in that case.

MR JUSTICE WARBY: Which passage in the Master's judgment are you referring to there?

MR POLAK: *Walden v Smith* --

MR JUSTICE WARBY: Well, no, I just want you to identify the error of law that you say is arguable in the Master's judgment.

MR POLAK: It's at paragraph 7, your Lordship. At paragraph 7, the Master states:

"In his particulars of claim, Mr Reynolds does not descend to any greater detail than to say for the most part in respect of most of the publications, barring the one email that is between himself and the defendant, what he says about them is they

were on, depending on the particular case, Facebook or YouTube or the worldwide web, but says no more than that, when in the defence the point is made a pleading must go further than that and identify the person who whom the material was published. The only response to that that the claimant gives is he gives the number of users of Facebook."

MR JUSTICE WARBY: So you say the Master was arguably wrong in his approach in the adequacy of the pleading of the case on publication.

MR POLAK: Yes. Yes, your Lordship, and I submit that it is a moot point of law and in the case of *Walden v Smith*.

MR JUSTICE WARBY: I understand the point.

MR POLAK: Further I would ask, when deciding whether the pleadings were actually inadequate, to take into account Master Bard's finding, which is at exhibit 28, which was, as Master Bard describes it, almost identical proceedings against an associate of this respondent.

From paragraph 10, he refers to the adequacy of the pleadings and at paragraph 12 he says --

MR JUSTICE WARBY: Oh, I see. Yes. So the Master didn't know anything about the claim that Master Eastman had struck out, but didn't consider himself bound.

MR POLAK: Your Lordship, yes, but what he does say is that the claims were almost identical and at --

MR JUSTICE WARBY: Well, no, what he says is he's told that it must be a claim which is in an identical form to this. But he says he didn't know the basis of what happened, so he can't see himself as bound. So that's a representation on behalf of the defendant in that case, that Master Bard should strike the claim or should set aside the default judgment against Mr Dehotu(?) because of what Master Eastman had done. Rather understandably he says, well, I'm not bound by that, I'll make my own decision on this case.

MR POLAK: I believe the application was to set aside on the basis that it was not fully or properly pleaded.

MR JUSTICE WARBY: Yes.

MR POLAK: What I did say with regards to that is it does throw up a point about it being reasonable prospects of success arguable that --

MR JUSTICE WARBY: Well, the problem with that argument is that I'd have to look at what it was that was before Master Bard in that case, compare it with what was before Master Eastman in this case and reach a conclusion on which of them was right, or arguably wrong.

MR POLAK: Your Lordship, yes.

MR JUSTICE WARBY: It's a convoluted approach to something which could be more easily done by identifying what you say is wrong in Master Eastman's judgment. I see why you look at Master Bard, because he took what you say is a different view, and that suggests --

MR POLAK: I don't know if they're possible --

MR JUSTICE WARBY: It depends on the proposition that the two pleadings are identical and that requires me in the time available to look at two pleadings, none of which I've seen until today, in the course of a 20-minute application.

MR POLAK: Your Lordship, yes. What I would say is I return to the main point about it being arguable that the exhibits we've shown do constitute publication or might constitute publication under the law as it stands.

MR JUSTICE WARBY: Right.

MR POLAK: If I may address paragraph D of the skeleton argument.

MR JUSTICE WARBY: Yes.

MR POLAK: At paragraph D the submission is that, whilst some consideration was given to the effect of these statements, not enough consideration was and that it was disproportionate to strike out in these circumstances. It was not something which had come before the court before, it's something which effects a convention right, the article 8 right to reputation and, further to that, our submission is that it was disproportionate not to consider other ways of dealing with the case in regards to whether an unless order could have been made or whether an order that no more than nominal costs or no more than nominal damages would be awarded in this case. Mr Reynolds is aware that, if he did go to appeal, he might make representations that nominal damages is what he is looking for in this case and it's not a case about damages, it's a case about him protecting his reputation as someone who is a politician and does sit within a number of committees before Parliament.

So my submission on that point is that the article 8 right to reputation isn't cited anywhere within the decision of Master Eastman and article 13, his right to an effective remedy as a litigant in person, is not. Of course, striking out of the claim I don't submit is contrary to article 6 in and of itself, but the submission is that it's disproportionate when considered with the other options available and the fact that there was evidence of the effect of this continued publication and harassment of Mr Reynolds.

MR JUSTICE WARBY: Yes.

MR POLAK: The point at paragraph E in short is that, at the striking out application, Mr Reynolds was self represented and there are a number of things which seem not to have gone before Master Eastman in regards to his attempts to ask the defendant's solicitors about any deficiencies in the name, he made those attempts

on a number of occasions and, further to that he didn't perhaps submit all evidence which could have been put before the court about his attempts to seek legal assistance, his contact with the defendant's solicitors and the fact that he on that occasion could have, in my submission, properly pleaded that publication had actually taken place.

MR JUSTICE WARBY: The point here is, what, that he didn't have a fair hearing?

MR POLAK: No, the point is that --

MR JUSTICE WARBY: Because the interests of justice on a rehearing is about the mode of appeal, not about whether there should be one, or there's a procedural error or --

MR POLAK: It's submitted that he didn't have an opportunity to put that information before Master Eastman at that time which would be put properly to an appeal court if he had the opportunity to do so, which very much would have had the possibility of ending up with a different result in the case.

MR JUSTICE WARBY: Right.

MR POLAK: It's submitted that any relevance or any referral to an abuse of process under the Jameel principles, and whether that is perhaps because of publication and the numbers of publication, the case law does not in my submission say that just because there are a perhaps small number of people published too, that it should be seen as a Jameel --

MR JUSTICE WARBY: Well, I don't suppose the ground is Master Eastman's decision, is it?

MR POLAK: Well, in my submission it's difficult to see whether it is the fact --

MR JUSTICE WARBY: I mean, look at paragraph 1 of the judgment. He identifies what the application is and what the grounds are and they don't include Jameel or any form of abuse of process. So I think you're tilting at windmills there. I mean, the decision was based upon pleaded issues and not the inadequacy of the underlying claim or any proportionality argument such as Jameel. I don't think there's a point you need to address.

MR POLAK: Your Lordship, yes. Perhaps I've taken that point from the submissions made in the skeleton argument of the defendant in that instance.

So, your Lordship, the submissions are that it's arguable, or there's a real prospect of success for arguing, that publication was in fact made, that perhaps Master Eastman did not take into account relevant factors in regards to it was not before the court Mr Reynolds' attempts to remedy any deficiencies in his claim, which he made on a number of occasions to the defendant. He refers to these in paragraph 26 to 30 and 32 and 40 of his witness statement. Further, it perhaps was not put before Master Eastman that the defendant had been in breach of the CPR in the past by filing a defence late. However, Mr Reynolds had, in the spirit of the Civil

Procedure Rules, not objected to this. So my submission on that point is, had he known of the efforts Mr Reynolds had gone to to seek to comply and to improve his pleadings and had he known that it was a defendant in times who was in breach of obligations, Master Eastman may have felt that a more appropriate way to grasp the nettle, especially when dealing with a litigant in person, would be an unless order, giving him seven days to action those deficiencies. Master Eastman recognises that Mr Reynolds is an intelligent man of some ability and it would not have taken much in an unless order to say this is what you're missing, this is what can be said, do it or your case will be struck out.

MR JUSTICE WARBY: Thank you very much. Any more on that?

MR POLAK: Your Lordship, unless I can assist you with anything.

MR JUSTICE WARBY: Thank you very much.

(The judgment followed)