Case No: IHJ/09/0699/10790244

NEUTRAL CITATION NUMBER: [2009] EWHC 3311 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 26 November 2009

BEFORE:

MR JUSTICE EADY

BETWEEN:

NORTH LONDON CENTRAL MOSQUE TRUST (A CHARITY)

Claimant

- and -

POLICY EXCHANGE & DENIS MCEOIN

Defendant

MS A PAGE QC and MR R MUNDEN (instructed by Farooq Bajwa & Co) appeared on behalf of the Claimant

MR A CALDECOTT QC and MR D GLEN (instructed by Collyer Bristow LLP) appeared on behalf of the Defendant

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Approved Judgment

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1. MR JUSTICE EADY: The issue I have to resolve is very straightforward. I am asked by the defendants to rule that the claimant in these proceedings, North London Central Mosque Trust, does not have capacity to sue.

2. There is no corporate entity corresponding to that name and, the defendants submit, no juridical person capable of suing, whether in libel or for any other cause of action. In the context of libel specifically, I was referred to the third edition of Duncan and Neill on Defamation, at paragraph 10.14 under the heading "Unincorporated Associations":

> "Unincorporated associations, other than partnerships, trade unions and employers' associations, cannot bring an action for defamation in the name of the association because the association does not constitute a legal entity. Nor, it seems, can some of the members of the association bring a representative action on behalf of the members as a whole in accordance with the procedure provided in CPR 19.6 (which requires the claimant to have the 'same interest' as those he represents). In many cases, however, where defamatory matter is published which relates to an unincorporated association, the people who are in control of its affairs may be able to establish that the words complained of are defamatory of them as individuals."

3. Ms Page QC, appearing on behalf of the claimant, suggests that that passage may need correction or refinement, although, if I may respectfully say so, it seems to me to represent a fair summary of the law in this jurisdiction as it currently stands. The way in which the case has been put for the claimant has varied from time to time, but an important step was taken when it was conceded earlier this month that it does not have capacity to sue in its own name. The complicating factor was the stance that "it" still had a claim in defamation but was required to bring such a claim in the names of the trustees on behalf of the trust. This position is said, on the defendants' behalf, to be inconsistent. If it has no capacity to sue in its own name, it is conceptually difficult to understand how others can do so on its behalf. They cannot confer upon a non-existent entity capacity which it does not and cannot have. To enable A to sue on B's behalf, B must have a claim.

4. There are individual trustees charged with responsibilities and obligations in connection with the charitable activities associated with the mosque, but the trust is not a legal *persona*: it consists of a set of obligations identified in the trust deed. My attention was drawn to Mr Luxton's work on The Law of Charities, where the point is addressed succinctly at page 259 in these words:

> "A charitable trust does not itself give rise to a distinct legal entity which can be identified as "the charity". A charitable trust, like any trust, is, after all, merely an obligation imposed on one or more persons in equity to hold property, in this case for charitable purposes. Any contract entered into by the trustees with respect to the charitable funds is therefore entered into by them personally."

5. In my judgement the lack of capacity is a fundamental problem of substance, rather than one of form, which cannot be cured by putting up individuals who do not wish to

sue on their own account, as was at one stage contemplated, but to do so in a representative capacity. Who or what is it that they wish to represent? That is a problem quite apart from the normal difficulty associated with representative actions in the context of libel actions generally; namely, that a representative has to have the same interest as the interest of the person or persons on whose behalf the action is taken.

6. The first question is to decide whether the claimant exists as a legal entity or *persona*. It has never been rendered or created a corporate entity by any of the usual methods. Nor, for that matter, have the trustees sought to apply for a certificate of incorporation under the provisions of the Charities Act 1993, but that is by the way. Ms Page submits that, in putting forward this argument, Mr Caldecott QC is reversing the role of the horse and the cart. First, she says, it is necessary to decide whether "the claimant" or "it" has a reputation and then one should strive to find a legal peg on which to claim a remedy for its being damaged. In my judgment that is the fallacy here. The primary question is whether "the trust" or "it" exists as a legal entity. Only if it does would it make sense to speak of "its" reputation. If it does not exist, it can have no reputation. A non-corporate charity can, in a loose sense, have a good or bad reputation which might encourage or discourage people from giving it money, for example, but a loose sense is not good enough if it comes to a claim for libel.

7. Ms Page relies upon the trade union cases which make clear that in certain circumstances a trade union can sue or be sued, but that is a very special case. For well known historical and political reasons Parliament chose to confer on trade unions the capacity to sue or be sued, as was explained in Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] AC 426 by Farwell J, whose reasoning was subsequently endorsed by the House of Lords. It would appear, from some of the cases cited by Ms Page, that in the United States the same dilemma has been, or may have been, addressed judicially.

8. There is no useful analogy here. Parliament has not conferred capacity to sue on this claimant or on charitable trusts in general. It is not a human being or a group of human beings, nor is it a corporation or quasi-corporation in the sense that it has been given some of the attributes of a corporation, such as the capacity to sue or be sued. If such a step were to be contemplated, careful thought would have to be given to the role of the trustees and the trust property, and such questions as whether it was capable of entering into contracts. At the moment any relevant contracts or commitments undertaken could only be those of the trustees themselves.

9. Mr Caldecott attaches some significance to the fact that at no stage has the Law Commission, or any relevant expert, ever called for the introduction of legal personality for charitable trusts as a class. There is apparently no compelling reason of public policy why that should be done.

10. These proceedings have been authorised by the trustees. Whether they will be able to resort to the charitable monies to fund the proceedings or for the purposes of any liability they may incur by way of costs, is a moot point as yet undetermined. They would have to have acted reasonably. Whether they have done so has not yet been determined but there is no evidence, for example, of a Beddoes order giving clearance in advance of their activities, although I understand that there is a Beddoes application

on foot now. That is not a matter, however, which arises directly before me on this first issue, although I may need to consider it when the consequences of my ruling have to be worked out.

11. I rule that the North London Central Mosque Trust lacks capacity. It is not an entity capable of suing for libel.

12. Application for permission to appeal is to be provided to me, in writing, within 14 days of the transcript of the proceedings being received.

COSTS

13. MR JUSTICE EADY: There is no objection to the principle that the defendants should have their costs of the action. There are two questions which have been raised by way of qualifying the generality of the order.

14. One is, it is said by Ms Page on behalf of the claimant, that the defendant should be confined to their costs from 29 April because it was then that the point was formally taken that the claimant lacked capacity to sue. However, two points arise. The first is this; it is the claimant's responsibility, or those acting on behalf of the claimant when initiating the proceedings, to ensure the question of capacity is got right. The second point is this; when the matter was raised with Mishcon de Reya, then acting for the defendants at the beginning of September, they queried the point politely by saying that they assumed the claimants were someone other than the trust. They were then reassured that it was indeed the trust who was acting. That constituted a representation by those acting for the claimant that the claimant had capacity to sue. Therefore, in all the circumstances, it is right that the defendants should have their costs from the beginning of the action.

15. The second question is in relation to the costs thrown away by the adjournment of the hearing before Sharp J on 9 November. On that occasion there was only one day available in the list before Sharp J and it became apparent that longer was required, as has indeed been borne out by the hearing before me. Furthermore, there was some confusion in the defendants' minds as to what they had to deal with on that hearing. In particular they were unclear as to the full extent of the concession and thought initially that they would not have to deal with certain categories of the cases, in particular trade union cases, which it transpired were still being relied upon. So there was confusion, which made it reasonable in the circumstances for Mr Caldecott to apply for an adjournment before Sharp J. Those costs were reserved and the defendants are, in the circumstances, entitled to them.

16. Costs are to be assessed, if not agreed.