

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Monday, 29 March 2010

BEFORE:

**LORD JUSTICE SEDLEY**

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BETWEEN:

**SARAH THORNTON**

Claimant

- and -

**TELEGRAPH MEDIA GROUP**

Defendant

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The Claimant was not represented.

MR DAVID PRICE (instructed by **David Price solicitors and Advocates**) appeared on behalf of the Defendant

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**Proceedings**

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Monday, 29 March 2010

A

LORD JUSTICE SEDLEY: Mr Price, good morning.

I have not had time to read the riposte you sent in to the note sent in by the other side but this case seems to me to have started as a mess and to be getting into a bigger mess.

B

Had it been accepted that this particular passage (these two sentences) is defamatory at all?

MR PRICE: No.

C

LORD JUSTICE SEDLEY: So that is the first issue. If that is the first issue, who formulated the two questions that Sir Charles Gray was asked to decide: him or you?

MR PRICE: He did.

We did suggest that preliminary issues such as defamatory meaning and fact or comment should be determined at the outset by a judge. The claimant refused that offer. We cannot compel them to do so because we cannot invoke the exception in section 69.

D

LORD JUSTICE SEDLEY: But I find this absolutely baffling. If there is an unresolved issue about whether the words have a defamatory meaning at all, and for my part (inaudible) that they do not, we are not talking about the offer of amends words, we are talking about: "... lets people see the copy ... journalists disapprove". Well, of course journalists disapprove. They would, would they not? They want editorial control. It is nothing to do with what right thinking people think about it.

E

MR PRICE: Yes. That is our submission and that is why the claimant has put in an alternative claim of malicious falsehood, the sole purpose of which must be for that situation.

F

LORD JUSTICE SEDLEY: Does it follow that the two questions that Sir Charles Gray had answered are all of them based on an unspoken premise that the words are defamatory?

MR PRICE: Yes.

Obviously it is an adversarial process so unless we put in issue, the question of whether the words are capable of being defamatory, then the court is going to proceed on the basis ...

G

LORD JUSTICE SEDLEY: But you have put that in issue.

MR PRICE: We have.

H

LORD JUSTICE SEDLEY: Show me the pleading.

MR PRICE: Yes, that is at tab 13 of the bundle and the relevant paragraph is 3.2 on page 91. If I could just ask you to read 3.2.

A

LORD JUSTICE SEDLEY: Well that is the point. Why will he not try it as a preliminary issue?

MR PRICE: Because it is a jury issue in a case to be tried by jury.

B

LORD JUSTICE SEDLEY: Why is it a jury issue if they are not capable of having a defamatory meaning? If no jury in its right mind could find defamatory meaning, why is that not a matter for the judge?

MR PRICE: Well, it would be. We have not made that application.

C

LORD JUSTICE SEDLEY: It is true you have not said that they are not capable of carrying defamatory meaning but you deny that they are defamatory and if your submission is as I apprehend it is, no jury could possibly find otherwise, then why is the matter the first preliminary issue for the judge?

MR PRICE: I suppose it could have been. There is a reluctance to make these sorts of applications at an interim stage because --

D

LORD JUSTICE SEDLEY: Look at what has happened now. An interim application built on air because it is built upon a premise that you contest.

E

MR PRICE: Yes. We were surprised that they made this application to strike out the third comment (inaudible). We thought it was clearly (inaudible) defence at the very least had a real prospect of sense but this case could have happily progressed along but for the fact that the claimant has chosen to issue this application and perhaps we were wrong not to make our own application to strike out on this particular aspect on the basis that it was not capable of being defamatory and that is still something that is open to us and probably it would make sense for that application to take place before any appeal if we were to get permission to appeal.

F

LORD JUSTICE SEDLEY: Well I have to say this is the struggle that I have had, reading those papers, looking at these issues and thinking, "What do they relate to? What is the libel?" I am not here to decide that but it seems to me that until that has been decided, the other questions are built on air.

G

MR PRICE: The Court of Appeal had exactly the same case management powers as any judge and it would be quite permissible and within your powers to adjourn this application for permission to appeal on our undertaking that we would make an application to strike out.

H

LORD JUSTICE SEDLEY: You would want an application. You would either apply for summary judgment on your defence or strike out the appropriate part of the pleading. The other thing that troubles me today is that the written submission by the other side says that if you get permission on this, they will put in a respondent's notice on the other issue. But it is not a respondent's notice issue. It is a cross-appeal issue. They have to obtain leave too. They are two discrete

questions. My inclination would in any event have been to adjourn this application so that they can cross-apply at the same time. It does not seem fair otherwise that you are left carrying this particular can.

A

MR PRICE: Especially because one has a self-denying ordinance (it is not a universal rule) in terms of an inclusive (inaudible) which is the judge's finding that the words were capable of being comment, the Court of Appeal is quite reluctant to give permission in those circumstances.

B

LORD JUSTICE SEDLEY: The judge is struggling, I suspect, to keep something alive, to cling to some of the wreckage but the wreckage is caused by the assumption that these words have a defamatory meaning. What I think I should do is give you the opportunity that you ask for. Whether I should do it only after hearing the other side, I think is perhaps more difficult. It may be that the better course (and I know it adds to expense for both parties) is to adjourn this application as I was minded to for the other side to cross-apply, if so minded, which they appear to be and then consider the course you are suggesting between the parties.

C

MR PRICE: I suppose it is open to us to issue an application now.

LORD JUSTICE SEDLEY: Nobody can stop you. It is perfectly true. If you tell me that that is what you are minded to do, then I will act on it. Do you want to take instructions?

D

MR PRICE: Yes. It will not take very long, I do not think.

LORD JUSTICE SEDLEY: No.

E

MR PRICE: Yes, I confirm that I can undertake to the court that such an application will be made.

LORD JUSTICE SEDLEY: I suspect the other side are in court.

MR PRICE: There are two representatives from the claimant's solicitor's firm but claimant's counsel is not here.

F

LORD JUSTICE SEDLEY: No, I realise that. I do not think it discourteous if I do not call on either of them because it seems to me that what you are putting to me is not something that anybody can stop you doing and that being so, my only question is what will I do in the circumstances and it will be to adjourn your application and give a short judgment to this effect.

G

(Judgment given)

LORD JUSTICE SEDLEY: Anything else for now?

MR PRICE: No.

LORD JUSTICE SEDLEY: Thank you very much everyone for your help.

H

MALE SPEAKER:...Would it be appropriate to reserve the application to your Lordship?

LORD JUSTICE SEDLEY: I reserve it to myself and in the ordinary way costs will be costs in the appeal if an appeal goes ahead. All that is for the future. I will just say costs reserved for now.

(The hearing concluded)

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