

ENGLAND AND WALES / JUDGMENT

Maccaba v Lichtenstein

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2003] EWHC 1325 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION Case No HQ02X00537 Royal Courts of Justice The Strand London WC2A 2LL
Date: Tuesday 15 April 2003 B e f o r e: MR JUSTICE GRAY B E T W E E N: BRIAN YOSEF
MACCABA Claimant

- v - DAYAN YAAKOV YISROEL LICHTENSTEIN Defendant

SMITH BERNAL Tape Transcription by Smith Bernal Ltd 190 Fleet Street, London, Telephone 020 7404 1400 (Official Shorthand Writers to the Royal Courts of Justice)

MR CLIVE FREEDMAN QC, MR DAVID SHERBORNE and MISS PATTERSON (instructed by Messrs Theodore Goddard) appeared on behalf of THE CLAIMANT MR JUSTIN RUSHBROOKE (instructed by Schillings) appeared on behalf of THE DEFENDANT

J U D G M E N T SMITH BERNAL MR JUSTICE GRAY: 1. 2. 3. 4. 5. 6. This is an application by the claimant in this action which is framed in slander, harassment and breach of confidence, to disapply pursuant to section 32A of the Limitation Act 1980 the one year limitation period in relation to two out of nine claims of slander alleged against the defendant. The dates when those two slanders are alleged to have been uttered were, admittedly, more than one year before these proceedings were commenced. The other seven claims in slander were started within the limitation period. This is an unhappily bitter dispute within the orthodox Jewish community. The claimant, Mr Brian Maccaba, is a patron and member of the Sephardi synagogue, of which his close associate Mr Moshe Cohen is a Rabbi. The claimant has supported a number of Sephardi religious and educational projects. He is an orthodox Jew. The defendant, Mr Dayan Lichtenstein, is the head judge of the Beth Din of the Federation of Synagogues. Among his duties is the issuing of certificates on behalf of the Federation relating to food supplied according to kosher principles. For the purpose of the present application the issues which arise in the action can be summarised as follows. The case for the claimant is that the defendant has on a number of occasions made allegations to third parties prominent in the Jewish community that the claimant, who is a married man, is promiscuous, has committed adultery and has had affairs with married Jewish women. Such slanders are alleged in the Particulars of Claim (as they stand at present) to have been uttered by the defendant on nine occasions. One women with whom it is

alleged that the defendant accused the claimant of having an adulterous relationship is identified in the Statements of Case, but I shall here refer to her as “Mrs A”. The claimant also complains of words spoken by the defendant to the effect that he had attempted to seduce another young married woman, to whom I shall refer as “Mrs S”. The claim in harassment is tersely pleaded at paragraph 29 of the Particulars of Claim. The claimant relies in support of his claim in harassment on the slanders allegedly uttered by the defendant and upon what is said to have been a breach of confidence on his part in removing a personal file relating to Mrs A from the Federation Beth Din and disclosing its contents to a third party. I am told by Mr Rushbrooke, who appears for the defendant, that an application to strike out the claim in harassment is under consideration, but at present it stands as part of the claimant's case. The defendant in his defence denies having spoken the words attributed to him. He does, however, allege that such words as he may be proved to have published were justified in the following meanings: firstly, that the claimant, a married man, behaved in a highly inappropriate manner towards other Jewish women including by sexually harassing one young married woman; and secondly, that there was a serious risk that the claimant might behave in a similar way towards Mrs S. The particulars of justification include allegations relating to Mrs A, Mrs S and another woman. They fall short of alleging any adulterous relationship with any of these three. There is also a defence of qualified privilege. In essence, the defendant alleges that he was approached by the family of Mrs A to assist in a SMITH BERNAL 7. 8. 9. pastoral capacity as a senior and respected Rabbi in the orthodox Jewish community. The conversations which are alleged to amount to slanders and to harassment of the claimant flowed from that approach. Accordingly the defendant asserts that he spoke the words complained of pursuant to a legitimate duty to do so. He further contends that his conduct was reasonable and so cannot constitute harassment. The claim in breach of confidence is also denied. In response, the claimant denies that the words were spoken on privileged occasions and alleges that the defendant was malicious and unreasonable in his conduct. The procedural history as it relates to the present application is that the claim form was issued on 19 February 2002. It was served endorsed with the Particulars of Claim on 18 June

2002. The defence was served on 23 September 2002 and the reply on 15 January 2003. A hearing for directions was initially due to take place before the Master on 10 October 2002. That hearing was adjourned until 4 December 2002. In between times, on 7 November 2002 the claimant made his application pursuant to section 32A of the Limitation Act. This application and the case management conference were referred by the Master to the judge in charge of the jury list. They were listed for hearing on 17 December 2002. However, on the eve of that hearing the defendant applied for an injunction. That application for injunctive relief was heard by Morland J in December 2002. The result was that the present application was relisted to be heard yesterday and today. Such are the bare bones of the chronology of the action. What is for present purposes important to note is that of the nine slanders pleaded the first two in time are said to have been uttered on 12 January and 13 February 2001 respectively. As is accepted by Mr Freedman QC on behalf of the claimant, they therefore became statute barred five weeks and six days respectively before the claim form was issued. To the extent that those slanders are relied on as part of the course of

conduct alleged to amount to harassment, they are not statute barred because the time within which actions for harassment must be brought is six years. 10. As I have said, the time limit for bringing claims in defamation is one year. Section 4A of the 1980 Act provides: “The time limit under section 2 of this Act shall not apply to an action for --

- (a) libel or slander; or
 - (b) slander of title, slander of goods or other malicious falsehood, but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.” The reason for this special rule in defamation cases was explained by Brooke LJ in *Steedman v BBC* [2002] EMLR 338, at paragraphs 36 and 37: SMITH BERNAL “36. Since 1996 there has been a special limitation period of only one year in relation to actions for defamation or malicious falsehood. The reason for this special rule is well known to the judges who hear such trials in London and Sir Oliver Popplewell has had vast experience in conducting such trials. As long as August 1989 Michael Davies J, who was then the judge in charge of the Queen's Bench Jury List, said that provided that the writ in the defamation action was issued within reasonable despatch and the lawyers thereafter stuck to the timetable prescribed in the Rules of Court, there was no reason why the trial of a defamation action should not take place within twelve months at the most of publication.
37. In *Hickman v Fletcher* (unreported, 12 November 1992) Drake J, another judge with great experience of this type of case, observed that the majority of libel actions were then brought on within twelve months or thereabouts of publication. David Steel J has quoted in paragraphs 20 and 21 some extracts from the report of Practice and Procedure in Defamation, which was issued by the Supreme Court Procedure Committee in July 1991 and from the recent Pre-Action Protocol for Defamation. The need to regard time as 'of the essence' in defamation claims was further explained by Glidewell in *Grobitt v Doctor* (unreported, 28 October 1993) when he said at page 15A: 'The purpose of a libel action is to enable the plaintiff to clear his name of the libel, to vindicate his character in an action for defamation in which the plaintiff wishes to achieve this end. He will also wish the action to be heard as soon as possible.'” 11. However, section 32A of the 1980 Act enables the court to disapply that limitation period in appropriate cases. So far as relevant it reads: “(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which --
- (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents; and
 - (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents, the court may direct that that section shall not apply to the action or shall not apply to any specific specified cause of action to which the action relates.
- (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to --

- (a) the length of and reasons for the delay on the part of the plaintiff; SMITH BERNAL
- (c) the extent to which, having regard to the delay, relevant evidence is likely --
- (i) to be unavailable; or (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.” Although section 32A does not in terms say so, there are several judicial dicta which make clear that the power under section 32A should not be exercised, save in exceptional circumstances, otherwise the statutory limitation period of one year and the reason for enacting it would be overridden: see *Incs v Channel 4 Television Corporation* (unreported, 3 March 2000); *Clarkson v Gilbert* (unreported, 26 February 2001); and *Steedman v BBC* (at first instance). In the latter case in the Court of Appeal Brooke LJ said at paragraph 41 that he agreed with the approach taken in those cases. He said: “I agree with Morland J that it would be quite wrong to read into section 32A words that are not there. However, the very strong policy considerations underlying the modern defamation practice, which are now powerfully underlined by the terms of the new Pre-Action Protocol for Defamation tend to influence an interpretation of section 32A which entitles the court to take into account all the considerations set out in this judgment when it has regard to all the circumstances of the case, as it is enjoined to do in section 32A(2).” 12. 13. The question I have to decide is, therefore, whether this is one of those exceptional cases where it is right to disapply the limitation period. Before summarising the arguments of the parties on that question, I should record the fact that I have heard cogent argument from both sides as to the merits or otherwise of these claims. It is plain that feelings run high. The facts, or at least the construction to be put on material events, are hotly contested. But it does not appear to me that in a case of the present kind it would be remotely appropriate for me to attempt to come to any conclusion where the merits of the case lie. In some cases, of which *Steedman v BBC* was one, it will be possible for the court to form a clear view of the merits of a proposed claim. But this is not such a case. To embark on a mini trial of the merits would be disproportionate, contrary to the overriding objective, and very likely unfair to one party or the other. The points made on behalf of the claimant why the limitation period should be disapplied are essentially these. It is submitted that there is no conceivable prejudice to the defendant by reason of the inclusion of the two slanders in the claim. It is said that the very short period of delay, post-expiry of the limitation period, cannot have had any effect at all on the availability or cogency of the evidence. The defendant was fully aware of the nature and extent of the two slanders from as early as June 2001. Accordingly, the defendant has had more than an ample opportunity to deal with them. Indeed, the defendant has fully pleaded SMITH BERNAL 14. 15. to those alleged slanders. Moreover, it is said on behalf of the claimant that the defendant will in any event have to meet the substance of the allegations which found the two alleged slanders at the trial when he comes to deal with the claim against him for harassment. The two slanders are, it is submitted, very similar in nature to the rest of the campaign of slander which the claimant says the defendant has mounted against him. The claimant asserts that this case is exceptional in that it is a multi-publication case, whereas most defamation actions concern a single publication. The significance of this, according to the claimant, is that the defendant in the

present case will face proceedings for defamation and for the other causes of action, even if the two slanders are dismissed on limitation grounds. The prejudice to the defendant from disapplying the limitation period is correspondingly reduced, especially since the same defences are relied on in relation to the first two slanders as are relied on in relation to the other seven. Moreover, the claimant contends that for the jury to hear the case in circumstances where no complaint was before them in relation to the first two slanders would be highly artificial. As Mr Rushbrooke on behalf of the defendant expressly and rightly accepted, it would not be possible to excise from the evidence before the jury the many references in the documents to the first two slanders. Indeed, the jury will, as things stand at present, be asked to award the claimant damages for the first two slanders even if they are struck out, because they form part of the course of conduct said to amount to harassment of the claimant by the defendant. Moreover, the defendant relies in support of his case on damages on what he maintains is the truth of what he said about the conduct of the claimant towards both Mrs A and Mrs S. For the defendant it is stressed that the one year limitation period is mandatory and that Hale LJ was right when in *Steedman v BBC* she described it as being “the normal rule”. It is therefore submitted on behalf of the defendant that the burden is upon the claimant to satisfy the court that this is one of those exceptional cases where it is equitable that the power under section 32A should be exercised. The defendant argues that if the claimant cannot provide an explanation of the reasons for the delay, then the burden which rests upon him cannot be said to have been discharged. The defendant points out that in the witness statement of Mr Martin Kramer of the claimant's solicitors in support of the application, there is no such explanation for the delay. Besides, says the defendant, the claimant will suffer no prejudice if he is held to be disentitled from relying on the first two slanders. If successful, the claimant will in any case recover damages for the other seven slanders as well, if he is right, for the claims in harassment and breach of confidence. It is suggested for the defendant that in all probability the claimant will lose nothing by way of an opportunity to vindicate his reputation through the slander claims which are not time- barred. 16. In order to underline that the claimant has failed to put forward any explanation for the delay in starting the proceedings in respect of the first two slanders, I was taken by Mr Rushbrooke in some detail to the history prior to the claim being started. It is pointed out that the claimant was aware of the relevant allegations of slander from as early as April

2001. Moreover, it is submitted that within days of his letter of 27 June 2001 the claimant knew that he was not going to receive from the defendant the redress which he had SMITH BERNAL demanded. There was then a long period of inactivity before the claimant wrote to the defendant on 30 January 2002, notifying him that he was formally complaining to the “appropriate authorities”. Yet it was not until 18 February 2002 that the claimant finally issued the claim form; and even then, it is pointed out, he did not serve it. The defendant further contends that the contention pleaded in paragraph 106 of the reply that the present proceedings were issued when it became clear that the defendant was not prepared to submit to the jurisdiction of the Ethical Committee of the Conference of European Rabbis

is simply wrong. True it is that the defendant did decline to have the case dealt with by that Committee, but that happened after the proceedings were issued and so cannot, asserts the defendant, have been the reason why the claimant had resort to the High Court. Such being the rival contentions, I am now in a position to state my conclusion. It is clear from the opening words of section 32A that the over-arching question on applications under that section is whether it would be equitable in the particular case to take the exceptional course of disapplying the one year limitation period. As to this, subsection (1) indicates that the first consideration is the degree of prejudice on the one hand to the claimant if the one year limitation applies and, on the other hand, the prejudice to the defendant if that period is disapplied. In some cases the extent of the prejudice to the opposing parties may be evenly balanced. There will, for instance, be many cases where if the one year limitation period is insisted upon, the claimant will be left without any remedy unless the power contained in section 32A is exercised in his favour. Conversely, if the limitation period is disapplied, such a defendant will have to defend a defamation action which he would otherwise have avoided altogether. In my judgment it is an important and unusual feature of this case that the prejudice which would be occasioned to this defendant by disapplying the limitation period is greatly reduced for two reasons. The first is that the action will proceed against the defendant, even if the application under section 32A is refused. The degree of prejudice to the defendant by reason of his having to face nine claims in slander instead of seven is limited, especially when one bears in mind that the sting of all the alleged slanders is very much the same and the defence to each of the slanders is likewise similar. The second and more cogent reason why the prejudice to the defendant is lessened in the present case is that even if the two claims in slander were to be dismissed on the ground that they are statute-barred, the defendant would still face claims in harassment founded on the self-same facts. I am not saying that there will be no prejudice to the defendant if the limitation period is disapplied, but I do think that the prejudice would in the unusual circumstances of this case and for the reasons I have given be slight. The converse question is the extent of the prejudice to the claimant if the one year limitation period is applied. I think that there is real prejudice to this claimant if by reason of the operation of section 4A of the Act he cannot obtain vindication in respect of the first two slanders. In this connection it is significant that both of these alleged slanders are specific in 17. 18. 19. 20. 21. SMITH BERNAL 22. 23. 24. 25. their terms in mentioning Mrs S by name, whereas the other alleged slanders consist in general allegations of adultery and having affairs. On that account the claimant can say with justification that there is a particular need for him to obtain vindication in relation to those two alleged slanders. Accordingly it appears to me that the prejudice to the claimant of applying section 4A outweighs the prejudice to the defendant from disapplying it. But section 32A(2) makes clear that "all the circumstances in the case" must be taken into account when deciding whether or not to direct that the section shall apply. In my view most, but not all, of the relevant circumstances favour disapplying the limitation period. In the first place the period of delay is very short in the case of both alleged slanders. I accept that there have been cases where an entire action has been dismissed where it has been commenced

within days of the expiry of the limitation period. Nonetheless, the period of delay is a factor specifically mentioned in subsection (2)(a) and is one which the claimant in the present case can pray in aid. So, too, is the claimant entitled to rely on the undoubted fact that in the present case the defendant had been well aware for months before the action was commenced of the nature of the slanders which it was being alleged he had uttered and of the complaint which the claimant was making against him in respect of them. In this regard the present case is starkly different on its facts from *Steedman v BBC* where, for reasons which were unexplained, no complaint whatever was made about the allegedly libelous broadcast for fourteen months, although the claimant's advisers had been aware of it from the date of the broadcast. The next factor which militates in favour of disapplying the limitation period is, in my judgment, a powerful one. It is the artificiality of the case proceeding with the two claims in slander removed from it. There are a number of aspects to this. In considering them it is necessary to bear in mind that if this action goes to trial it will be heard by a jury. The artificiality arises, firstly, because even if the claim in respect of the two slanders is dismissed, the claim in harassment will remain and the jury will therefore hear evidence from both sides as to what was and was not said on the two occasions when the slanders were allegedly uttered. Because of the way in which the defendant pleads his case on damages it appears that there will be argument and evidence as to the extent to which what may prove to have been said on those occasions was true. There will also be argument and evidence in the context of the claim in harassment as to whether the conduct of the defendant was unreasonable in what he said on those two occasions. So the jury will be told a great deal about the circumstances of the two alleged slanders. Yet they will have to be directed that if and when it comes to assessing damages for defamation, but not damages for harassment, they must ignore the two slanders. That appears to me to be a state of affairs that is not only artificial but also undesirable if justice is to be done between the parties. The artificiality is increased because the gravamen of the claimant's complaint has from the outset been that the defendant has been conducting a campaign against him. How is the jury to evaluate this complaint if, at least for the purposes of the defamation claim, the first two slanders are to be ignored. SMITH BERNAL 26. 27. 28. 29. Another circumstance which is specifically mentioned in section 32A(2)(c), namely the extent to which, having regard to the delay, evidence has become unavailable or less cogent. It is accepted by the defendant that the delay here has given rise to no evidential problems, so this cannot be relied as a reason for applying the one year limitation period. But section 32A(2)(a) also requires the court to have regard to the reasons for the delay. This is the feature of the present case which has caused me most concern. In his able argument opposing the application, Mr Rushbrooke relied heavily on what he says is the striking absence from the evidence in support of the application of any explanation of the reason for the delay on the part of the claimant. It seems to me that there is force in the point that there is no reason why the court should infer that there is some good reason for the delay of the kind contemplated by the Supreme Court Procedure Committee under the chairmanship of Neill LJ (see *Steedman v BBC* at paragraph 20). Judging by the note of the meeting which took place between the parties on 24 June 2001, it must have been

apparent to the claimant that, notwithstanding his apology, the defendant was going to repeat his allegations of sexual misconduct against him. Furthermore, the response of the defendant to the claimant's letter of 27 June 2001 asking whether he intended to continue his campaign of defamation gave the claimant no grounds for optimism for the future. The claimant had in his letter of 27 June 2001 referred to his offer not to proceed against the defendant in the English courts if he felt that the defendant had made a full admission and a sincere apology. Neither was forthcoming, yet the claimant delayed until 19 February 2002 before issuing a claim form. I accept that the explanation for the timing of the commencement of proceedings which is pleaded at paragraph 106 of the reply is unsustainable. The absence of evidence from the claimant as to the reasons for the delay is undoubtedly a factor to be taken into account in deciding this application. But having done so, I have nevertheless come to the conclusion that the application to disallow the limitation period should be granted. The section requires me to take account of all the circumstances. The reason for the delay is but one of the circumstances to be considered. It would, in my view, be wrong to elevate the reason for the delay to the point where it becomes determinative of the application in favour of the defendant. Unsatisfactory though it is for the court to be denied an explanation of the reason for the delay, a number of points emerge from the contemporaneous documents. The first is that there can be no doubting the extreme concern felt by the claimant about what he understood the defendant to have been saying about him to other members of the community to which they both belong. That is self-evidently why the claimant took his complaint to the Beth Din, which is acknowledged to be the appropriate means whereby one orthodox Jew should seek redress against another. It was no fault of the claimant that his subsequent attempt to take his complaint before the Conference of European Rabbis came to nothing. It is apparent that the claimant was reluctant to incur the disapproval of fellow members of the orthodox Jewish community which would follow his starting proceedings in the secular courts against a fellow member of that community. SMITH BERNAL 30. As I have said, I do not think it would be right, in the absence of any explanation from the claimant, to draw a positive inference that there was some legitimate reason for the delay. At the same time I cannot see that there can have been any sinister reason for the delay. Mr Freedman says, and I have no reason to doubt him, that it was not due to an error on the part of the claimant's solicitors that there was delay in issuing the proceedings. Mr Rushbrooke was unable to suggest any sinister inference for the delay. Moreover, I bear in mind that it will in any event be open to the defendant at the trial to draw the attention of the jury to the unexplained delay in commencing these proceedings. 31. Taking into account all the circumstances of the case, as I am required to do by section 32A, I have come to the conclusion that the limitation period should be disapplied in relation to the two claims in slander. SMITH BERNAL

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/qb/2003/1325>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/maccaba-v-lichtenstein-2003>

Prepared on 24 October 2026 · Esheria