

JERSEY / JUDGMENT

1999/199 - Le Main v Eves [1999]

UR 199 (17 November 1999)

[1999] UR 199

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JUDGMENT

THE COMMISSIONER: This matter arises from a letter written by the Plaintiff to his legal adviser, which may not have gone to the Defendant, threatening to make certain allegations public during the forthcoming Deputy's election for No 2 District, St Helier.

The background to the case is that in 1997, the Defendant brought an Order of Justice against the Plaintiff, and the Court imposed,

ex parte,

an interim injunction in the following terms:

"Service of this Order of Justice will operate as an immediate interim injunction restraining the Defendant from acting abusively, aggressively, hostilely and insultingly against the Plaintiff and his wife, and making insulting telephone calls, and in all other matters, unlawfully, as outlined in the attached Affidavit."

When we look at the affidavit, however, we find that it is not as supportive of the wide ranging injunction as might have appeared, because the affidavit which was attached to the application to the learned Deputy Bailiff when the Defendant or his lawyer appeared before him, does not refer to telephone calls at all. The paragraph in support of the application is as follows:

"I make this Affidavit in support of my application for an immediate interim injunction restraining Deputy Terence John Le Main from acting abusively, aggressively, hostilely and insultingly against me. From calling the police to remove me from the Elizabeth Terminal, which is a public place; from causing turmoil, a public disturbance, and a breach of the peace in Elizabeth Terminal or any other public area. I further make an application that I can enjoy the facilities of the Elizabeth Terminal, attend at its public counters, and generally obtain leaflets and information appertaining to matter which I am interested in without interference, abuse, and threats to my person from the said Deputy Terence John Le Main."

The Plaintiff, as a result of the letter I have just referred to, obtained an immediate interim injunction against the Defendant on 2 November this year. In his Order of Justice were set out a number of particulars referred to in the letter, which, it is said, were untrue or unsubstantiated.

We have before us today a summons by the Defendant seeking either to have the interim injunction lifted or, if the court were not so minded, to vary it and substitute alternative words for the very wide ranging injunction, as drafted.

To assist us in arriving at our decision, we have looked at the correspondence, and in particular at an open letter written by the Defendant's advocate to the Plaintiff's advocate, dated 12 November 1999. Mr Taylor, who appears for Mr Eves, and who has argued cogently on his behalf, suggests we should read that letter, in the light of the submission that it was written with a view to achieving moderation between the parties, and in which a number of admissions are made.

The first allegation of the Plaintiff about which he complains in the letter to his Advocate is at paragraph "A":

"Your client has a consistent record over the last twenty years of having regularly appeared in Court to answer charges of fraud, deception, and assault."

In the letter of 12 November from Advocate Taylor to Advocate Livingstone, that paragraph is qualified by the following words:

"My client undertakes to temper the allegation so that it reflects the true position."

The second matter complained of at paragraph "B" is this:

"The Plaintiff is at the moment flagrantly and deliberately in breach of an injunction which I have taken out against him."

As regards that matter, we were told that it is the honest belief of Mr Eves, and that he still believes that to be the position. The fact, however, is that even if there were telephone calls - and we have no evidence before us that there were - that injunction although it contained a reference to telephone calls was not supported by an affidavit verifying them, and therefore for the purposes of this case, we disregard them.

Mr Le Quesne argued that paragraph "B"

("The Plaintiff is at the moment flagrantly and deliberately in breach of an injunction which I have taken out against him")

is totally wrong, for the reasons that I have given; the telephone conversations were not in the affidavit. Mr Le Quesne said - and on our reading we agree with him - that the affidavit really referred to what amounted to public harassment, and therefore the question of a breach, which was not a breach of public harassment, cannot be justified.

I interpolate here for a moment to say that, looking at Mr Eves' affidavit dated 16 November 1999 in support of his application to lift the injunction, there is a clear statement at paragraph 4:

"If an action were commenced by Mr Le Main, based on this letter, I would seek to plead justification by way of a defence."

Clearly that paragraph covers the whole of the matters complained of by the Plaintiff, and as Mr Le Quesne has pointed out, with two exceptions, none of the allegations could be justified were an action for defamation, in due course, to be brought.

I pass on to paragraph "C" of the 12 November 1999 letter. The complaint is about the following sentence:

"During a personal conversation I had with one of the most prominent advocates of the Royal Court earlier this year when we were discussing the criminal activities and criminal records of States members, he quite voluntarily confirmed that your client had a criminal record, but they let him off."

The comment in Mr Eve's advocates letter is this:

"My client does not propose to pursue this particular point."

Clearly, if he is not going to pursue it, it cannot be justified and I think that is all that need be said.

As regards paragraph "D":

"The Plaintiff is continually misusing and abusing his position as a States' member".

Mr Le Quesne accepts that this paragraph is capable of being defamatory, but is equally capable of justification and therefore he does not seek to maintain the injunction in respect of that paragraph in the Order of Justice.

Paragraph "E" reads as follows:

I am informed by a member of the public that because of the Plaintiff's position further allegations of fraud were not proceeded with."

As Mr Le Quesne has pointed out, that either means that the Defendant had committed fraud but it was hushed up, or that he was let off when he should not have been, but it is difficult to see, if this were an action in defamation, how justification could be pleaded there for the simple reason that in the letter from Mr Taylor appears the following comment on that complaint:

"My client has expressed his concern over two matters which have come to his attention. I have advised him that until he has further and better information, he should not seek to pursue this allegation. He has been advised not to raise these further allegations until he is in possession of additional information which he has been advised he should disclose to you should it be obtained prior to the Deputies elections on 24 November 1999."

That, as Mr Le Quesne says, not disrespectfully, was a frivolous matter, and it could not possibly be relied upon in justification in the way it has been put, and in fact that admission has been made by Mr Eve's advocate.

"F" states:

"The facts of my current Court action prove that Senator Rothwell found a willing ally to carry out the destruction of our lives, in the Plaintiff".

Mr Taylor says:

"I have informed my client that allegations raised in his Order of Justice do not amount to proof of the allegations".

Again that is another point which makes it impossible in our view, to advance a plea of justification. Mr Eves may have volunteered to remove the sting, but the sting is clearly there.

That leaves "G":

"The behaviour of Deputy Le Main during his term of office is nothing short of deplorable".

Mr Le Quesne has conceded - that as with paragraph "D" - those are comments which may be capable of justification in due course, and again he does not seek to continue with the injunction in respect of "G".

To sum up, it is clear to us that Mr Eves has accepted that the allegations in "A" are incorrect. That as regards "B" they are patently incorrect, and indeed are accepted as incorrect. "D" and "G" I have already mentioned. "E" is incorrect, "F" is incorrect.

What we really have to do in a case like this, is to perform a balancing act. Certain principles were laid down in the case of *Horsfall -v- Sinel* (12 February 1997) Jersey Unreported. That case can be distinguished from this one because it was a case about defamation, but the guiding passages to which we have had regard are equally applicable, it seems to us, in respect of words or documents which may be defamatory but which might possibly, in due course, be justified. Whether they are or not may be for another Court to decide.

In the case of *Horsfall -v- Sinel*, the allegations had been made before the elections which had then taken place and Senator Horsfall had been re-elected. Nevertheless, the Court sat to consider the principles involved. In this case, the elections in respect of No 2 District, St Helier, where the Plaintiff is standing as one of the candidates, are due to take place next week, and different considerations really apply.

As I said, we have had to carry out a balancing act. We are conscious of the fact that comment may well be justified in the sense that it is a matter of public interest. As is said on page 14 of the *Horsfall -v- Sinel* Judgment, quoting from Gatlley on Libel and Slander (8

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Ed'n) para. 884:

"In cases of comment on a matter of public interest, the limits of comment are very wide indeed, this is especially so in the case of public men. "Those who fill public positions must not be too thin-skinned in reference to comments made upon them."

and the passage goes on:

"One who undertakes to fill a public office offers himself to public attack and criticism, and it is now admitted and recognised that the public interest requires that a man's public conduct shall be open to the most searching criticism. Unless there is some clear evidence of malice or some mis-statement of fact..."

and that is what Mr Le Quesne relies on, certainly the second part, mis-statement of fact.

... "no action should be commenced however severe the terms of criticism may be".

And again there is a passage on the same page from Bean on Injunctions, (7

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Ed'n) at p.54: an important passage for democracy:

"Freedom of speech is so important that if a person is only saying or repeating what he honestly believes to be true an interim injunction will not be granted against him".

The trouble with the case we have before us that is that Mr Eves, in the letter from his advocate - whatever the motive for writing it - has clearly admitted in several places, to which I have referred, that the statements he has been making are not founded on fact, and therefore if they are not founded on fact it is difficult for this Court to see how it could have an honest belief in them.

Mr Taylor has said that Deputy Le Main should not be able to hide behind an injunction of this nature and that the public are entitled to know - so to speak - all about him, and if there are matters in his past life which Mr Eves thinks the electors of No 2 District should know - providing they are true - he should be free to disseminate them. We do not dissent from that view. But in our opinion we have to consider whether the public interest covers all that was said in the letter from Mr Eves' advocate to Mr Le Main's advocate, and about which Mr Le Main now complains. We have to balance that against the position that not only has the public the right to know all the facts about the candidates, but an election must itself be fair.

If anyone is able to make allegations, which it is difficult to see how he could justify after he has admitted that they are factually incorrect, then that does not seem to us to be a fair use of that very precious freedom of expression which I have already mentioned. And accordingly, apart from the matters in paragraphs "D" and "G" of the letter which Mr Le Quesne is not asking us to maintain, we see no reason to lift the injunction.

It just remains for me to say one more thing: an alternative form of wording was suggested by Mr Eves, but this did not cover - for example - paragraph "B" of the letter, and that would not be sufficient in our view, to safeguard the position. Accordingly, we have performed a balancing act and we think that the balance comes down in favour of maintaining the injunction with the two exceptions I have mentioned.

Authorities

Horsfall -v- Sinel (12 February 1997) Jersey Unreported.

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