Neutral Citation Number: [2023] EWHC 1453 (KB)

Case No: QB-2021-001981

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 June 2023

Before:

HIS HONOUR JUDGE LEWIS
(Sitting as a Deputy Judge of the High Court)

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Between:

ARRAN COGHLAN **CLAIRE BURGOYNE**	**Claimants**
- and -	
LEXLAW LIMITED	**Defendant**

- -
- -

Max Cole (instructed by **Brandsmiths Solicitors**) for the claimants
Andrew Young (instructed by **Lexlaw Solicitors**) the defendant

Hearing date: on paper

- -

Approved Judgment

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HIS HONOUR JUDGE LEWIS

His Honour Judge Lewis:

1. This judgment is handed down following the trial of a preliminary issue conducted on the papers, without a hearing.

2. In 2018, the claimants brought a claim for professional negligence against their former legal advisers. They retained the law firm Lexlaw – the defendant - to represent them under a conditional fee agreement. The seven defendants to that claim were represented by BLM Law.

3. In March 2020 the claimants terminated the defendant's retainer, prior to the conclusion of the professional negligence proceedings.

4. On 21 May 2020, the defendant sent a letter to BLM Law ("the Letter"), the terms of which are set out in the schedule to this judgment.

5. A year later, the claimants issued these proceedings in respect of the Letter. The claimants have sued for defamation, breach of fiduciary duty, misuse of confidential information and breaches of data protection rights. The claimants state that they expect to recover £100,000.

6. On 23 March 2023, Nicklin J directed that there be a trial of the following preliminary issues pursuant to CPR 3.1(2)(i) and (j) and CPR PD 53B para 6: (i) the natural and ordinary meaning of the statement complained of; (ii) whether the statements complained of are (or include) statements of fact or opinion; and (iii) whether the statements are defamatory of the claimants at common law.

7. On 3 May 2023, Nicklin J directed by consent that the trial of the preliminary issue will be conducted on paper.

Legal principles

8. The court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words to bear. In ***Jones v Skelton*** **[1963] 1 WLR 1362** the Privy Council explained what is meant by a natural and ordinary meaning:

> "The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. …. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words." per Lord Morris at 1370.

9. The long-established principles to be applied when reaching a determination of meaning were re-stated by Nicklin J in ***Koutsogiannis v Random House Group Ltd*** **[2019] EWHC 48 (QB)** at [12]:

> "(i) The governing principle is reasonableness.
>
> (ii) The intention of the publisher is irrelevant.
>
> (iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.
>
> (iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.
>
> (v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.
>
> (vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.
>
> (vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.
>
> (viii) The publication must be read as a whole, and any "bane and antidote" taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (eg bane and antidote cases).
>
> (ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.
>
> (x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

> (xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.
>
> (xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.
>
> (xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning)."

10. In ***Millett v Corbyn*** **[2021] EWCA Civ 567** at [9], Warby LJ summarised the principles to be applied when determining whether a meaning is defamatory at common law:

> "At common law, a meaning is defamatory and therefore actionable if it satisfies two requirements.
>
> The first, known as "the consensus requirement", is that the meaning must be one that "tends to lower the claimant in the estimation of right-thinking people generally." The Judge has to determine "whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society": Monroe v Hopkins [2017] EWHC 433 (QB), [2017] 4 WLR 68 [51].
>
> The second requirement is known as the "threshold of seriousness". To be defamatory, the imputation must be one that would tend to have a "substantially adverse effect" on the way that people would treat the claimant: Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB), [2011] 1 WLR 1985 [98] (Tugendhat J)"

Materials

11. I first read the words complained of to form a provisional view about meaning, before turning to the parties' pleaded cases and submissions, see ***Tinkler v Ferguson*** **[2020] EWCA Civ 819** at [9].

12. I then considered the claim form, the particulars of claim, the defendant's written case on meaning, the orders in the case, skeleton arguments from both parties and the authorities bundle.

13. The defendant has sought to include emails in the bundle by way of background context. The defendant's covering letter says that this material goes to the truth of the words complained of. These materials are not admissible in respect of a determination of meaning and so I have not considered them.

The claimants' case

14. The claimants say the natural and ordinary meaning of the Letter was that:

> "The claimants have terminated the retainer of their solicitors, the defendant, in respect of the litigation with BLM Law's clients, without paying the defendant what they owed them, being £93,259.62 with interest of 8% per annum over a base rate and statutory late payment fees. All monies received by the claimants in those proceedings are subject to an equitable lien in favour of Lexlaw. BLM Law and their clients need to be notified of this unpaid debt and equitable lien because there is a serious danger that Mr Coghlan and Ms Burgoyne will deliberately and wrongly knowingly cheat Lexlaw out of these monies and will not have the financial means to pay".

15. The claimants say that the Letter went much further than asserting a lien, indicating to the reader that there was no realistic possibility of the fees being discharged by the claimants in the ordinary way. It is said that the ordinary reader would inevitably consider what had prompted the defendant to write in such terms and would draw the "obvious" and "only realistic" inference that the claimants have not paid what is said to be owed, that there are reasonable grounds to believe that they will not do so, and that the claimants are very likely to act dishonestly to avoid payment. It is said that this is a classic example of a "Chase level 2 meaning", namely that there are reasonable grounds to suspect that the claimant is guilty of the act identified. This is a reference to ***Chase –v- News Group Newspapers Ltd*** **[2003] EMLR 11** at [45] in which Brooke LJ identified three broad types of defamatory allegation.

16. The claimants say that the words complained of comprise statements of fact. They say that the allegations touch on commercial probity and that right thinking people expect others to pay for services that they have received. Suggesting that a person will not be paying for services received to "deliberately and wrongly" cheat another is, it is said, plainly defamatory.

The defendant's case

17. The defendant says the natural and ordinary meaning of the Letter is that:

> "a. The Defendant believed that it had an equitable lien over the monies recovered or to be recovered by the Claimants;
>
> b. that equitable lien arose because the Defendant had acted for the Claimants on a contingent fee basis in the Garstangs Claim
>
> c. the Defendant then valued its solicitors' lien in the sum of £93,259.62;
>
> d. the solicitors acting for the Garstangs parties in the litigation were, as a result of the 21 May 2020 letter, on notice of the Defendant's assertion of an equitable lien;

> e. In the premises, the solicitors acting for the Garstangs parties ought to make payment to the Defendant in accordance with the solicitors' lien in the event that a situation arose which meant that the Garstangs parties would be making payment of any sum to the Claimants; and
>
> f. in the event that the solicitors acting for the Garstangs parties ignored the equitable lien, the Defendant would seek to recover the sum due to it from the solicitors so acting for the Garstangs parties"

18. References to the "Garstangs parties" are to the seven defendants to the professional negligence action.

19. The defendant's pleaded case is that the Letter contained statements of facts and opinion.

20. The defendant says that it is important to recognise the context in which the Letter was sent, and that the hypothetical reader must be taken to be representative of those who would have read the publication. The letter was sent from one law firm to the other. It is said that this was a legal notice served on solicitors to assert a lien over part of any settlement monies. There was no suggestion in the letter that payment was overdue. It is said that the claimants' meanings are strained and unnatural.

21. In written submissions, the defendant also says that the recipients of the Letter would have appreciated that with a CFA in place, fees only become payable if there is a successful outcome. This is not, however, part of the defendant's pleaded case.

Discussion

22. This is a letter sent between two sets of litigation solicitors. It is written in straightforward terms, asserting a lien over any damages that might be due to the claimants at the end of the case.

23. The claimants say that the reader would consider what had prompted the defendant to write in such terms. I do not agree. There would have been no need for them to do so because the Letter explains very clearly that the defendant was writing to protect its position and it explains the legal basis for doing so. Whilst there is a reference in the letter header to "unpaid legal fees", it is apparent from reading the letter as a whole that any costs had not yet fallen due. The letter did not cast aspersions in respect of the claimants' conduct, and only a reader avid for scandal would think that it did.

24. I am satisfied that the natural and ordinary meaning of the Letter is that: The claimants had entered into a conditional fee agreement with the defendant. As a result of this agreement, the defendant has an equitable lien in the "fruits of the litigation" between the claimants and BLM Law's clients. BLM Law were therefore required to discharge the defendant's fees – at that time £93,259.62 plus interest at 8% per annum over base - from any settlement sums before paying these to the claimants. If BLM Law did not do so, the defendant would seek to enforce its lien against the claimants.

25. The Letter contained statements of fact.

26. The Letter was not defamatory of the claimants at common law. It said nothing about the claimants' character and would not have lowered or tended to lower the claimants in the estimation of right-thinking people generally.

27. It follows that the defamation claim is dismissed.

28. The proceedings continue in respect of the other causes of action, which have not been considered within this judgment.

SCHEDULE – THE LETTER

[The pleaded words complained of do not include the words in the third paragraph shown in square brackets.]

Letter from LexLaw to BLM Law.

21 May 2020

Dear Sirs

NOTICE OF: (I) LEXLAW LTD'S EQUITABLE LIEN FOR UNPAID LEGAL FEES; (II) REQUIREMENT FOR DEFENDANTS TO DISCHARGE LEGAL FEES; AND (iii) INTENTION TO ENFORCE EQUITABLE LIEN AGAINST DEFENDANTS

Re: Arran Coghlan & Claire Burgoyne (the "Claimants") v. (i) Garstangs Solicitors (a firm); (ii) Garstangs Burrows Bussin LLP (trading as Garstangs Burrows Bussin Solicitors); (iii) Cartwright King Limited (trading as Cartwright King Solicitors); (iv) Roger Alexander Ingram; (v) Michael Edward Garstang; (vi) Glen Keith Henry; (vii) Richard Barrington Cornthwaite (the "Defendants")
Claim Number: BL-2018-002139
Your Clients: the Defendants
Our Client's Former Clients: the Claimants
Our Client: LexLaw Limited

We write further to the above Claim and on behalf of our above named client. We write to give you formal notice of our client solicitor's equitable lien in the fruits of the litigation between your clients and our client's former clients (together the "Parties").

Please note that, pursuant to a Conditional Fee Agreement, our client has an equitable lien over fees in the amount of £93,259.62 plus interest at 8% per annum over base rate and late payment fees (together the "Payment"), which has arisen as a result of our client's retainer with the Claimants in the above Claim. Please let us know as and when you require an up to date calculation of the Payment.

We remind you that the importance of the equitable lien has been a longstanding principle of English law, [with Lord Mansfield having held in Welsh v. Hole (1779) 1 Dougl KB 238 that "if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice"].

In the more recent Court of Appeal's decision in Khans Solicitors v. Chifuntwe [2014] 1 WLR 1185, reaffirmed the importance of the equitable lien, holding that:

> "In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if.. . the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees" (emphasis added).

We also remind you that the Supreme Court even more recently reiterated in Gavin Edmondson Limited v. Haven Insurance [2018] UKSC 21 that solicitors remain entitled to enforce their equitable lien against the paying party in litigation, with Lord Briggs holding that Sir Stephen Sedley's statement in Khans Solicitors (as quoted above) was "a correct statement of the law".

This letter constitutes notice that no settlement sums should be paid to our former clients unless the Payment due to our client has been discharged by your clients pursuant to our client's equitable lien. Your clients now have the requisite notice and knowledge to render a subsequent payment of settlement monies direct to the claimant unconscionable (to the extent of the Payment), as an interference with our client's interest in the fruits of the litigation.

In the event that you disregard this notice of our client's equitable lien, our client has given us instructions to enforce its lien against your clients and to recover from your clients not only the Payment sum due but also the costs of and occasioned by and incidental to such enforcement on the indemnity basis.

In the circumstances please confirm:
(i) receipt of this notice;
(ii) that you will keep us regularly updated as to settlement discussions;
(iii) that you will seek the updated level of the Payment whenever relevant in settlement discussions;
(iv) that your clients will discharge the Payment directly to our client out of any agreed settlement monies (bank details will be emailed to you).

We look forward to hearing from you by return and no later than noon on 26 May.

All of our firm's legal rights remain strictly reserved and nothing in this correspondence is intended to waive or restrict any of the same.

Yours faithfully
LEXLAW