IN HER MAJESTY'S COURT OF APPEAL A2/2010/1562

CIVIL DIVISION

ON APPEAL FROM

THE HIGH COURT OF JUSTICE Claim No. HQ 09 X 02747

QUEEN'S BENCH DIVISION

Between:—

SHAUN BRADY

Claimant

-and-

KEITH NORMAN

Defendant

SKELETON ARGUMENT OF THE CLAIMANT

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1. The factual background to this matter is so fully set out at paragraphs 4 to 15 of Eady J's judgment that there could be no purpose in attempting a paraphrase.

2. Eady J was hearing an appeal from Master Leslie, who had refused to disapply the one year limitation period for an intended defamation claim by C against D, so permission is being sought for a second appeal against (it will be said) the exercise of discretion.

3. Such an appeal has to satisfy the stringent requirements of CPR 52.13 (2) (a). High though the hurdle is set, the application for permission ought to be granted, for the intended appeal would squarely raise the important question of law considered at para. 22.07 of *Duncan & Neill on Defamation*, 3rd ed., namely whether, on an application under Section 32A of the Limitation Act 1980 to disapply the one year limitation period for defamation claims, judges should be guided by the Court of Appeal's recent decision in *Cain v. Francis*[1] on the very similar words of Section 33 of the Limitation Act, and attach "paramount importance" to the absence of real prejudice to the defendant in the conduct of his case, and little weight to the loss of the "windfall" limitation defence itself, or whether (as Eady J held at paras. 22 and 23) different considerations apply in defamation from personal injury cases, so that *Cain v. Francis* is not a helpful authority, and this Court's earlier decision in *Steedman v. BBC*[2] should be followed in defamation cases in preference to *Cain v. Francis,* a personal injury case.

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1 [2008] EWCA Civ. 1451 [2009] 2 All ER 579

2 [2001] EWCA Civ. 1534; [2002] EMLR 17

4. The relevant statutory provisions are as follows. Section 4A[3] of the Limitation Act 1980 provides that:

"The time limit under section 2 of this Act[4] 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."

5. Section 32A of the 1980 Act provides that:

"Discretionary exclusion of time limit for actions for defamation or malicious falsehood

"(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—

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[3] Substituted in relation to causes of action arising after 4th September 1996 by s.5 (2) of the Defamation Act 1996

[4] Section 2. Time limit for actions founded on tort

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

“(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 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 the reasons for, the delay on the part of the plaintiff;

“(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—

“(i) the date on which any such facts did become known to him, and

“(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

"(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.

"(3) . . .

"(4) In this section "the court" means the court in which the action has been brought.

6. Section 33 of the 1980 Act is in similar but not identical terms, and relates to personal injury actions. It provides that:

"Discretionary exclusion of time limit for actions in respect of personal injuries or death

"(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 provisions of section 11 or 11A or 12 of this Act prejudice 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 those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

"(1A) . . .

"(3) 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 the reasons for, the delay on the part of the plaintiff;

"(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;

"(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

"(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

"(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

"(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received . . .

"(7) In this section "the court" means the court in which the action has been brought.

7. Master Leslie's reasons for refusing to disapply the limitation period are to be found at para. 17 of his judgment. Firstly, D would be prejudiced if he were deprived of the benefit of his accrued defence of limitation. Secondly, the evidence would be less cogent than it might otherwise have been. Thirdly, some criticism could be made of C's decision to proceed by way of an application by Part 8 Claim Form, rather than issuing a Part 7 Claim Form, waiting for the limitation defence to be pleaded, and then applying under section 32A.

8. Eady J differed from Master Leslie on the second and third points. C submits that Eady J was right for the reasons that he gave at para. 30 of his judgment not to be impressed by the suggestion in Master Leslie's judgment of a "possible loss of cogency in the available evidence".

9. Eady J was also right, C submits, to disagree (at para. 18 of his judgment) with Master Leslie's criticism of the Claimant's decision to proceed by Part 8 Claim Form.

10. D sought to introduce further matters both in a Respondent's notice and in oral argument. Eady J was right to reject (at paras. 27 to 29 of his judgment) all D's additional arguments.

11. Notwithstanding Eady J's view (at para. 31 of his judgment) that Master Leslie looked at the matter "in the round", very little is left of Master Leslie's reasoning after taking into account the factors set out at paragraphs 8 and 9 above, upon which Eady J came to quite different conclusions from Master Leslie.

12. Apart from the question whether the loss of a limitation defence is prejudicial of itself, the only remaining consideration that carried any weight with Master Leslie or Mr Justice Eady was whether any further vindication of C's reputation is needed, bearing in mind his earlier forensic victories. But the very words complained of show how D made light of the judgment of the Employment Tribunal in favour of C, and publicly denied that its findings amounted to a vindication of C's reputation.

13. Eady J nevertheless upheld Master Leslie's decision, holding firstly that it is not an error of law to take into account the loss of the limitation defence as a factor in itself (at para. 24 of his judgment) and secondly that Master Leslie had been entitled to find that the delay in making the application was too long (at para. 17 of his judgment).

14. The degree of importance to be attached to the loss of the limitation defence *per se* and to delay in the bringing of a claim in the absence of prejudice to a defendant in advancing his case have long been moot.

15. Sir Roger Parker thought the absence of forensic prejudice to a defendant of "paramount importance" in *Hartley v. Birmingham City D. C.*[5] (a personal injury case, which has been regarded as helpful in deciding defamation cases in the past, and is cited in *Gatley* at para. 19.21, note 127).

16. In *Steedman v. BBC*[6], David Steel J treated *Hartley* as no longer being binding authority (since it was a pre-CPR decision), so that until the recent decision of the Court of Appeal in *Cain v. Francis*[7], it was thought that the absence of prejudice is no longer a decisive factor or "trump card[8]".

17. The learned authors of *Duncan & Neill* now however suggest[9] that *Steedman v. BBC* may itself have to be reconsidered in the light of *Cain v. Francis*, which "rehabilitates" *Hartley's* case.

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[5] [1992] 1 WLR 968 at 980 (C. A.)

[6] [2001] EWCA Civ. 1534; [2002] EMLR 17

[7] a case on s. 33 of the Limitation Act, 1980

[8] *per* Eady J in *Gentoo Group Ltd v. Hanratty* [2008] EWHC 627 QBD, though in the event, *Gentoo* was successful before Eady J in its application under s. 32A.

[9] at para. 22.07, p. 262

18. Smith LJ delivered the leading judgment in *Cain v. Francis*. At paras. 47 to 52, she referred in some detail, and with evident approval, to Sir Roger Parker's judgment in *Hartley*, adding (at para. 51) her own emphasis to his words:

> "what is of paramount importance is the effect of the delay on the defendant's ability to defend".

19. At para. 57, Smith LJ says:

> "It does not seem to me that the length of the delay can be, of itself, a deciding factor. It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference."

20. At para. 70, she says:

> " . . . in fairness and justice, the defendant ought to pay the damages if, having had a fair opportunity to defend himself, he is found liable".

21. Smith LJ's exposition of the law at para. 73 is to very different effect from *Steedman v. BBC*. Furthermore, the views of Sir A.

Morritt, C. in *Cain* at 81[10] and of David Steel J at para. 29 (1) of *Steedman*[11] are diametrically opposed.

22. The explanation for the difference in judicial opinion is that in *Steedman* David Steel J[12] treated Lord Diplock's view in *Thompson v. Brown* [1981] 1 WLR 744 that the loss of a limitation defence is always in some degree prejudicial to the defendant as "of general application", whereas in *Cain* Smith LJ concluded[13] that "Lord Diplock's view on that point was not part of the *ratio* of the decision".

23. *Cain* and *Steedman* cannot be reconciled, and one must ultimately be preferred over the other. In particular, they cannot be reconciled by saying (as Eady J did at para. 19 of his judgment) that special policy considerations apply to defamation actions, for that leads to a strange dichotomy. In defamation actions the loss of a limitation defence is apparently to be treated as highly prejudicial of itself, whereas in personal injury actions, it is not of itself to be taken as prejudicial at all.

24. That surely cannot be right. The question whether the loss of the limitation defence is prejudicial in itself (as held in *Steedman*, but rejected in *Cain*) must be answered at a higher level of

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[10] " . . . It does not appear to me that the loss of a limitation defence is regarded as a head of prejudice to the defendant at all."

[11] "(1) Relief granted to the claimants under the section would be highly prejudicial to the defendants. There is a clear time-bar."

[12] *Steedman*, paras. 17 and 18

[13] *Cain*, para. 44

jurisprudential generality than the classification of the cause of action as defamation or personal injury.

25. Indeed, special policy reason requiring the shortening of the usual six year limitation period in tort were perceived much earlier in the personal injuries field than in defamation. As Smith LJ observed in *Cain*[14]:

> "So far as personal injury actions were concerned, the limit remained at six years until the Limitation Act 1954, when it was reduced to three. I infer that Parliament must have thought that, in the context of that kind of action, unfairness to the defendant was likely to arise at an earlier date than in other actions."

26. It will accordingly be noted that Parliament reduced the limitation period for personal injury actions founded on negligence[15] to three years in 1954, whereas that did not happen until 1984 in defamation. Subsequently, the limitation period in defamation actions was further reduced in 1996 to one year.

27. There is more force in Eady J's point[16] that *Steedman* was not cited to Smith LJ in *Cain*. Still, there is nothing in the wording of sections 32A and 33 of the Limitation Act 1980 which suggests that the two sections should be construed differently in this regard.

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[14] at para. 66

[15] (as opposed to battery)

[16] at para. 19

28. *Cain v. Francis* should be followed in preference to *Steedman.* It represents the law as it has most recently been declared in the Court of Appeal. Smith LJ's and Sir A. Morritt C's analyses of *Thompson v. Brown* are compelling, and ought to be applied by analogy to applications under section 32A. Lord Clarke of Stone-cum-Ebony M. R. cited them with evident approval in *A. B. & Ors v. Nugent Care Society* [2009] EWCA Civ 827 at 23-24:

> "What Parker LJ meant has been fully explored in the judgments of Smith LJ and the Chancellor in *Cain v Francis* and *McKay v Hanlani* [2008] EWCA Civ 1451. All he was intending to say was that the prejudice to the defendant of losing a limitation defence is not the relevant prejudice to be addressed. The prejudice to be addressed is that which affects the defendant's ability to defend."

29. Permission to appeal is sought accordingly.

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20th July 2010

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SKELETON ARGUMENT OF THE CLAIMANT

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