IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HHJ MOLONEY QC
sitting as a Judge of the High Court

Claim No HQ 13 D 03755

FRANK OTUO — Claimant

And

THE WATCHTOWER BIBLE AND TRACT SOCIETY OF BRITAIN — Defendant

The Claimant in person

Mr Richard Daniel of counsel, instructed by Richard Cook, for the Defendant

JUDGMENT
(handed down 5 December 2013)

A. INTRODUCTION

1. This judgment concerns two inter-related applications in a slander action:

a. by the Claimant for a ruling on defamatory meaning; and

b. by the Defendant to strike the claim out, either as being non-defamatory or as being non-justiciable as a matter of law (because it concerns essentially religious issues).

2. The undisputed outline facts are as follows:

i. The Claimant has for many years been a member of the Christian church known as Jehovah's Witnesses.

ii. The Defendant is a registered charity which organises the UK and Ireland branch of that church.

iii. Pursuant to its rules, the church held an internal inquiry into allegations of misconduct against the Claimant (specifically, of fraud in a business transaction with another member) and decided to expel him from membership ("dis-fellowshipping").

iv. Again pursuant to its rules, the following announcement was made at the Claimant's local Congregation in Wimbledon on 19 July 2012 in the presence of a fairly large number of churchgoers (C says about 75): *"Frank Otuo is no longer one of Jehovah's Witnesses"*.

v. Exactly 12 months later, on 19 July 2013, C issued a claim in slander upon the above occasion of publication, followed on 12 August 2013 by his original Particulars of Claim.

vi. Before serving its Defence, D issued an application to strike out (dated 23 August 2013 but not sealed until 24 September 2013).

vii. At about the same time, C issued his application for a ruling on defamatory meaning, and also applications to amend his Particulars of Claim and for Part 18 information from D.

viii. All four applications were listed for hearing before me on 1 November 2013.

3. First, I partly allowed the application to amend the PoC, specifically to clarify C's case on innuendo meaning prior to consideration of the meaning applications. Of my own motion I then struck out an extremely long section in which C recited exhaustively his case about the original business transaction and the church's allegedly malicious investigation into it. It appeared to me that those matters would be relevant, if at all, only if D's Defence (yet to be served) raised a case that would bring them in. I adjourned the Part 18 application pending my rulings on meanings and strike-out, which are set out below.

B. DEFAMATORY MEANING

4. This claim is one to which the statutory right to jury trial of a defamation claim (soon to be removed by the Defamation Act 2013) still applies. The right to make such an application subsists until 28 days after service of the Defence. While D was willing to opt for trial by judge alone, C preferred to keep his options open and declined to make that concession. In such a case it is usually premature to decide, prior to service of Defence, whether or not the case is unsuitable for jury trial (e.g. by reason of the volume of documents to be considered). The consequence is that at this stage the judge must approach all questions of defamatory meaning on the "jury trial" basis, i.e. ruling what the words complained of are capable of meaning, not what meaning they actually bear.

5. In deciding these questions I bear in mind the classic guidance on assessing defamatory meaning, originating from Neill LJ and more recently summarised by Clarke MR in Jeynes v. News Magazines [2008] EWCA Civ 130. At para. 14 he sets out the eight guiding principles, of which I bear in mind particularly here the second (the hypothetical reasonable reader is not naïve nor unduly suspicious; he reads between the lines; he can indulge in un-lawyerlike loose thinking but he is not avid for scandal) and the sixth (the hypothetical reasonable reader is taken to be representative of those who would read the publication in question).

6. The latter principle requires some further consideration in the circumstances of this case. As I understand it, it is addressed to such matters as the difference between the "typical" readership of, say, the Daily Star and the British Medical Journal, and is aimed at encouraging the court to take a realistic view of, for example, what one might expect to form part of the general knowledge of a typical reader for the purposes of assessing inferential natural and ordinary meanings. Here, the hearers were all present at a Jehovah's Witnesses meeting, and are therefore likely to have been either members of that church or otherwise interested in it. But:

a. the hypothetical reasonable reader, even if assumed to be attending such a church, is not himself a Jehovah's Witness or a member of any other section of society having special views of its own on the topic of the words complained of; he remains a right-thinking member of society generally, applying general not special standards to his understanding of words and his appreciation of their meaning;

b. so far as natural and ordinary meaning goes (as opposed to true or legal innuendo) he or she is not to be treated as possessing, as part of his general knowledge, any special information likely to be known only to Jehovah's Witnesses;

c. even for the purposes of the "true innuendo", considered at (8) below, though he is then treated as knowing the same special facts about Witnesses and their religion as the actual hearers did, still he continues to apply general standards to the issue of meaning, i.e. interpreting the words with the addition of that knowledge but not with the addition of any different beliefs or attitudes that might lead an actual Witness to form an adverse view of C when a hypothetical reasonable reader possessed of the same information would not.

7. The first question on meaning is whether the words complained of are capable of being defamatory in their natural and ordinary meaning, that is the meaning they would convey to an ordinary reasonable member of the general public not familiar with any special facts which would not be likely to be known by such a person (such as detailed knowledge of the doctrine and practice of the Jehovah's Witnesses).

The answer to this is clear. Even with all due allowance for the inferences which such a person would be entitled to draw, and the loose thinking (by lawyers' standards) which he might engage in, no reasonable member of the general public would think the less of a person or draw any adverse inference about him from being told, without more, that he had been, but was no longer, one of Jehovah's Witnesses.

- The literal meaning is plainly neutral in defamation terms. Whether one does or does not remain a member of a particular Christian denomination, it is not a matter which could affect one's general reputation adversely.
- As to the inferential meaning, if a reasonable hearer sought to draw inferences from the announcement alone as to what the underlying reasons for C's ceasing to be a member might be, he would soon conclude that the range of possible reasons (including creditable, neutral and discreditable ones) was so wide, and the available information so limited, that it would be wrong to draw any adverse defamatory inference.

The pleaded natural and ordinary meaning, that he had been dis-fellowshipped because he had committed, without remorse, some serious misconduct such as fraud or paedophilia, might be tenable as an innuendo (see (8) below) but it is not one which any reasonable hearer unfamiliar with the religion of the Witnesses could possibly derive, even at the level of suspicion, from the words complained of considered without that background.

For these reasons, the claim based on natural and ordinary meaning will have to be struck out.

8. The next question, a central one so far as the Claimant's case is concerned, is that of the "true innuendo meaning". His pleading, even in its amended form, remains rather unclear and unspecific on such matters as what precisely are the special facts which he says some hearers will have known, who those informed hearers were, what are the facts and matters on which he proposes to rely to prove that they had that knowledge, and what is the defamatory inference that they would have drawn as a result. These are matters that may have to be clarified by a request for further information. But the outline of C's case is sufficiently clear for present purposes, and I may summarise it as follows:

"a. The doctrines and practices of the Jehovah's Witnesses church are set out in many publications of the Defendant.

b. Those publications are thoroughly studied at the congregation meetings and are familiar to those who heard the words complained of.

c. They include explanations of what constitutes misconduct by a Witness, and how it can lead to their being investigated and ultimately expelled. The acts of misconduct include fraud, fornication, adultery, homosexuality, greed, extortion, theft, drunkenness, murder, idolatry, spiritism, apostasy and divisiveness. If he is found to have committed such an act, a Witness may be expelled, unless he shows remorse.

d. The words complained of, even if apparently innocuous, are in fact a coded formula laid down in those publications for use when publicly expelling a member for misconduct, and are known as such by the other members/attenders.

e. Therefore, to the audience which heard them, those words pronounced in those circumstances bore the special meaning that C had engaged in one or more of the acts of misconduct, and shown no remorse, so as to deserve expulsion."

9. The Defendant disputes this case at every level. It has put in affidavit evidence to show that the same form of words is used to refer not only to those who are being expelled for misconduct, but also to those who have simply drifted away from the church and are to be "disassociated" from it, which is not a defamatory allegation in anyone's book. It denies that the publications relied on by C are available to or read by ordinary members, saying they are confidential to the elders. It invites me to strike out the innuendo claim as well as the natural and ordinary meaning.
In response, C maintains his position, adding that in 40 years in the church he has only once before heard such an announcement at a meeting; it is a rare and sensational event.

10. In principle, C's case appears tenable. If knowledge of those facts by the congregation could be proven, then a court might well be able to conclude that a reasonable hearer who knew them would, even though not a Witness, draw from them a meaning defamatory of C.
(Given that not all the acts of "misconduct" in the eyes of the church are defamatory by general standards, homosexuality or apostasy for example, the highest defamatory meaning might be confined to the level of suspicion rather than guilt of discreditable conduct; but that is a matter for a later stage of these proceedings).

11. At this point, however, I should take a step back and remind myself that both applications, C's on meaning and D's on strike-out, are interim applications made at the very outset of the case, before even a Defence has been pleaded, let alone any disclosure given or witness evidence heard. By definition, an innuendo meaning is a fact-sensitive matter. First the special facts have to be proved. Then it has to be proved that the audience knew those facts, or some of them. Then the court has to get a sense of the context: how common are these announcements? in what manner and circumstances are they made? Only then can the court reach a reliable conclusion on the meaning issues, whether "capable" or "actual".

12. Neither party is yet in a position to put before the Court the factual matrix necessary to ground the ruling it seeks. The Claimant has not proved the special facts to be true or known; the Defendant has not proved the contrary. This is not a case where the innuendo is so far-fetched that it would clearly be unsustainable even if I accepted the whole of its alleged factual basis. Nor is it a case which the Defendant can destroy the innuendo on paper with irrefutable evidence of its own.
For these reasons, I shall adjourn both applications in respect of the innuendo meaning case, with liberty to each party to restore them, but not before the time for the service of a Reply has expired (and even then it may well be too soon).

C. IS THIS CLAIM JUSTICIABLE?

13. The Defendant also puts forward a more fundamental objection to the Claimant's case. It is that as a matter of law there are strict limits on the degree to which an English court can inquire into or adjudicate upon the internal affairs of a voluntary religious body, and that this case oversteps those limits. It submits that, though in form this is a defamation claim, in substance it raises issues of church doctrine and procedure that are not justiciable by the secular courts or appropriate for judicial determination.

14. The Claimant disputes this. Assuming that in due course the church defends the action by relying on justification and/or qualified privilege, he submits that what the court will actually be inquiring into is:

a. whether or not he was guilty of fraud in his commercial transaction, a question which is eminently suitable for judicial determination and is indeed before another civil court at present; and/or:

b. whether or not the Elders who dealt with his case under the church's internal disciplinary procedures were actuated by express malice towards him, again a question of fact which does not trespass on any essentially religious ground.

15. Mr Daniels concedes that, if the Claimant had applied in time, he might have been able to bring a legitimate application for judicial review of the disciplinary process, confined to the question whether the Church had properly complied with its own rules; but he submits that the present action, going to the merits of the decision, falls within the prohibited area.

16. Mr Daniels has helpfully provided the Court with an extensive selection of British, Commonwealth, Irish and United States decisions bearing directly or indirectly on the limits of judicial inquiry into religious matters. (I have also considered two recent UK Supreme Court cases concerning such matters, the racial discrimination case of Jewish Free School [2009] UKSC 15 and the employment case of President of the Methodist Conference v. Preston [2013] UKSC 29, though the question of justiciability played little part in them.)

17. The earliest is Forbes v. Bishop Eden (1867) LR I 568 (HL) relating to a dispute within the Episcopal Church of Scotland about the use of Prayer Book services. Lord Colonsay said at 588:
"A court of law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine, when not necessary to do so in relation to civil interests."
(At that time civil rights or interests would generally have been proprietary in nature, but today the term would cover a much wider area.)

18. The most recent is Khaira v. Shergill [2012] EWCA Civ 983, a Chancery case concerning the trust deeds of two Sikh charities. The central question was whether a certain cleric was in the designated line of succession from the founder of the charities, so as to be entitled to exercise the power to appoint and remove trustees. At para. 19 of his judgment, Mummery LJ summarised the principle of non-justiciability in religious matters as follows:
"The courts abstain from adjudicating on the truth, merits or sincerity of differences in religious doctrine or belief, and on the correctness or accuracy of religious practice, custom or tradition. The courts also exercise caution in adjudicating on the fitness or otherwise of a particular individual to carry out the spiritual duties of a religious office, although there are some employment rights cases in which jurisdiction has been exercised on the basis of the existence of a contract of employment and of statutory rights not to be unfairly dismissed or discriminated against on a prohibited ground."
And at para. 26, he said:
"In my judgment, Lord Wilberforce in the Buttes Gas case [1982] AC 888 at 938 gives the courts the clearest and most authoritative guidance that can be found in the authorities about the basis on which a line is drawn between justiciable and non-justiciable issues. It must be done with caution, especially in cases where the civil rights of the parties, such as property and contract, may be affected."
Earlier, at para. 15, he had summarised Lord Wilberforce's guidance as being that one of the factors for judicial self-restraint or abstention is the absence of "judicial or manageable standards by which to judge these issues", leading to a "judicial no-man's-land".

Applying that test to the specific issues in the case before it, the CA concluded that the question of succession to the position of Third Holy Saint was one of religious doctrine or practice on which the Court could not adjudicate, *"a matter of professed subjective belief on which secular municipal courts cannot possibly reach a decision"* (para. 72).

19. It is worth noting for the avoidance of confusion that these cases disclose two distinct situations:

a. cases like Forbes, in which the very subject matter of the dispute is outside the court's jurisdiction, because of its inherently religious nature which gives rise to no known civil claim; and

b. cases like Khaira, in which the subject matter of the dispute (e.g. the administration of a charitable trust) is in principle within the court's jurisdiction, but the "factual"/evidential decisions required to resolve it are of such a nature that the court is unable to make them.

It is also worth noting that religion is not the only "no-go" area for the courts; a similar approach is taken, for example, when a case involves trespassing on parliamentary matters (see Prebble v. TV NZ [1995] 1 AC 321).

20. One line of modern authority relied on by Mr Daniels is a series of judicial review cases in which the courts have declined to decide religious issues, of which the most relevant to this case appears to me to be R. v. Chief Rabbi, ex p. Wachmann [1992] 1 WLR 1036 (CA). A rabbi had been dismissed after the Chief Rabbi had held an inquiry into allegations of adultery and declared him religiously and morally unfit to occupy his position. Simon Brown J held (at 1043B) that:
"the court is hardly in a position to regulate what is essentially a religious function, the determination whether someone is religiously and morally fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised boundary between church and state".
(I am however cautious about relying too heavily on judicial review cases in this tort action, particularly a case over 20 years old and preceding the Human Rights Act 1998. I note Mr Daniels's concession that judicial review might in principle have been available in this case.)

21. Of more obvious relevance is a line of modern defamation cases in which similar decisions have been taken on their particular facts:

a. Blake v. Associated Newspapers [2003] EWHC 1960 (QB) Gray J.

The claimant had officiated at a televised "gay wedding" ceremony and sued on newspaper articles describing him as an "imitation" and "self-styled" bishop. He claimed to have been duly consecrated as a bishop within POEM, a religious body of which he was one of the founders, by a person who had himself been consecrated within the Liberal Catholic Church and claimed the apostolic succession. Gray J referred to the authorities on religious non-justiciability, in particular Wachmann (above), and listed at para 33 the questions raised on the statements of case (for example concerning canon law, ecclesiastical procedure, and moral standing and fitness for office) which were plainly not justiciable within the established principles. He emphasised that a stay should only be granted in the most extreme circumstances, since its effect would be to deny the claimant the chance to establish his good name in the courts; for this reason he considered whether the issues could be tailored so as to render them justiciable, but concluded that they could not.

b. Baba Jeet Singh v. Eastern Media [2010] EWHC 1294 (QB) Eady J.

This libel action arose out of the same dispute as that in Khaira (above) about the standing of the claimant as the Third Holy Saint. An article in the Sikh Times about the Gurdwara in High Wycombe was said by the claimant to accuse him of being the leader of a cult and an impostor. Not surprisingly, Eady J concluded that the resulting claim and the defences of justification and comment/opinion were non-justiciable under the foregoing principles.
Two points made in the judgment appear to me to be of special relevance to this case.

i. At para. 6, Eady J emphasises that the inquiry into non-justiciability must examine the issues in the light of the parties' pleaded cases. *"It must be a specific inquiry to be made on the facts. It must not be a matter of general impression... The judge will need to identify all the issues... and decide whether they fall within the doctrine of judicial abstention to which I have referred."*

ii. He went on to emphasise that this is not an all-or-nothing exercise. *"There may be questions of pure fact which taken by themselves could readily be determined by the court in the usual way. It will be necessary to decide whether that process should go ahead despite the exclusion of primary doctrinal or other religious issues"*. And, at para 41, he gave an example: *"If an allegation were made of someone who happened to be a religious leader that he had had his hand in the till or had assaulted a follower, this could be determined separately and without reference to religious doctrine or status"*.

(The decision was appealed, but not on the decision as to non-justiciability.)

c. Shergill v. Purewal [2010] EWHC 3610 (QB) Sir Charles Gray.

This claim arose from essentially the same dispute as Khaira and Baba Jeet Singh save that the claimant was a supporter of the Third Holy Saint rather than the Saint himself. The legitimacy or otherwise of the Saint's position in terms of Sikh religion was central to the pleaded issues and evidence and it was not possible fairly to hive off a justiciable area for trial. It is a further application of the same principles and practice as in the foregoing cases.

22. I have also read the various overseas authorities put forward by Mr Daniels, but in the light of these recent English decisions, directly in point and made by judges expert in English libel and human rights law (including the ECHR factors which do not apply in the other jurisdictions apart from the Irish Republic) I do not consider them to add anything material to this case.

23. I must now apply the above principles and practice to the facts and issues in the present case.
In his affidavit in support of the application, Mr Cook, solicitor for the Defendant, asserts at para. 9 that: *"the Court is being asked to adjudicate on the truth of disputed tenets of religious beliefs and faith, or in the alternative on the correctness of religious practices and procedures"*.
As to the former, he does not identify any dispute between the parties on the tenets of the religious beliefs and faith of the Jehovah's Witnesses. Nor does Mr Daniel, in his very careful and thorough Skeleton Argument. On the limited material before me, it appears that both sides are in agreement on the creed of their religion, on what is or is not forbidden to its members, and even on what procedures should be adopted to inquire into misconduct and what steps it is proper to take in respect of those found guilty. There may be doctrinal issues involved (for example, it appeared from some of the evidence before me, though the point was not argued, that Witnesses may have a doctrine of exclusivity in association which

renders it of special spiritual importance that the congregation be told who is or is not in good standing) but if there are they have not yet been clearly pleaded or put in evidence.

24. Where the parties certainly differ is as to Mr Cook's latter point, whether those procedures were or were not applied honestly and fairly to the Claimant in this particular case.
That question appears to me at the present stage of the action to lie on the borderline between the justiciable and the non-justiciable. It may be as simple and secular a point as the inquiry, envisaged by Eady J, as to whether the minister had his hand in the till. Or it may, on further particularisation, involve matters going beyond the sphere of this court, for example assessment of moral worth or true remorse. Before the issues have been defined by both sides' pleadings, it is too soon to say.

25. In summary, my conclusion is that the application to strike out for non-justiciability has been brought prematurely and should be dismissed on that sole ground, with liberty to re-apply after the expiry of time for service of the Claimant's Reply. (Even then it may be better to await disclosure and/or exchange of witness statements.) I appreciate the reasons, financial, and otherwise, why the Defendant brought this application so soon after service of the claim. It is right to bring such applications reasonably early, and not leave them until trial as in the Sikh cases above, when they serve little useful purpose except to increase delay and expense. But, for the reasons given by Eady J and Gray J in the cases cited above, it is a grave matter to deny a trial or a remedy to a Claimant who, ex hypothesi, has been the subject of a defamatory publication and is presumed to have been injured thereby. It is insufficient for a Defendant simply to assert (in effect) that because of its religious status it is immune from suit. That would be to claim an absolute privilege which has never been recognised and could easily be abused. A ruling of religious non-justiciability has to be based on a close scrutiny of the specific issues arising on the pleadings in the particular case, and the burden is firmly on the religious body to put forward a clear and detailed case as to why the action must be struck out or stayed. As yet that burden has not been discharged here.

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