Neutral Citation Number: [2019] EWHC 350 (QB)

Case Nos: HQ13M03735
HQ14M02898

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before :

THE HONOURABLE MR JUSTICE WARBY

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Between :

Frank Kofi Otuo	**Claimant**
- and -	
The Watch Tower Bible and Tract Society of Britain	**Defendant**

And between:-

Frank Kofi Otuo	**Claimant**
- and -	
(1) Jonathan David Morley	
(2) The Watch Tower Bible and Tract Society of Britain	**Defendants**

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The Claimant in person
Shane H Brady (instructed by **Legal Department, Watch Tower Bible and Tract Society of Britain**) for the **Defendants**

Hearing dates: 11 and 15 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WARBY:

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1. Mr Otuo was expelled from the Jehovah's Witnesses in 2012, the announcement being made at a meeting of the Wimbledon Congregation. He sues the first defendant ("Watch Tower") for slander in respect of that announcement ("Claim 1") and, in a second action ("Claim 2"), in respect of some words spoken at another meeting just over a year later by Mr Morley, the second defendant in Claim 2. The Court has found that the words complained of bore, among others, imputations of guilt of fraud.

2. In earlier judgments on this prolonged Pre-Trial Review I have dealt with applications to dismiss the claims, strike out pleadings, and permit the service of witness summaries, as well as applications for relief from sanctions. Now, I have to address Mr Otuo's application for permission to amend his claim forms, Particulars of Claim and his Replies to advance a claim for remedies for breach of contract, and/or corresponding allegations by way of reply to the Defences.

3. He has tried to do some of this before. Over four years ago, on 10 and 11 December 2015, Sir David Eady heard an application by Mr Otuo to amend his claim form and Particulars in Claim 2 to add a claim for breach of contract in respect of the process leading to his expulsion or "disfellowship" from the Jehovah's Witnesses. (At the time, Claim 1 stood dismissed on limitation grounds, a decision later reversed by the Court of Appeal.) In his reserved judgment of 15 January 2016, [2016] EWHC 46 (QB), Sir David dismissed the application for permission to amend.

4. The Judge was not persuaded by the defendants' argument that the Court would necessarily conclude that the religious context meant the case was one where there could not be an intention to create legal relations. But the draft amendments were found to be deficient. In particular, they asserted a factual basis for the claim which was impossible given that the second defendant ("Watch Tower") did not exist at the time of the alleged contract. Further, no proper basis was pleaded for any contractual relationship with Watch Tower. Further still, on the basis of the Articles of Watch Tower, which were in evidence before him, Sir David was unable to see how it could be said that Mr Otuo was a member of that body. He was not satisfied that the claim was or could be satisfactorily formulated against an existing party to the claim.

5. The present application was made by application notice dated 7 February 2019, three years after Sir David's decision and just over a month before the trial date. The trial is listed for 11 March 2019. The application was supported by a witness statement of Mr Otuo, also dated 7 February 2019, which explained that the application and the draft amendments were based on a document disclosed by the defendants following the directions Order of HHJ Parkes QC dated 17 September 2018. The document is a Constitution dated 29 May 1997 of the Congregation. It was disclosed by Mr Morley. It was disclosed, or rather produced, in April 2018.

6. What Mr Otuo now wishes to do, by what he himself describes as a "late application to amend" is to amend his claims "to include a breach of contract as the Constitution makes no provision for the expulsion of members within the Congregation". More accurately and specifically, he proposes to Re-Re-amend his Particulars of Claim and amend his Reply in Claim 1, and to Re-amend his Particulars of Claim and amend his Reply in Claim 2.

7. The proposed amendments fall into two main groups. The amendments to the Particulars of Claim are designed to advance breach of contract as a cause of action which entitles Mr Otuo to relief from the Court. Mr Otuo wishes to add a paragraph asserting that he was a member of the Congregation; that its constitution made no provision for expulsion; and that therefore the actions of the defendants of which he complains were *ultra vires.* On the back of this, he seeks the following relief:

> "that the Defendants be ordered to make an announcement to the Congregation "in the terms that the expulsion of the Claimant on 19 July 2012 was unconstitutional, as such the claimant is reinstated as a member of the London Wimbledon Congregation of Jehovah's Witnesses upon the announcement pursuant to the Court's Order."

8. The amendments to the Replies have different purposes. First, the alleged contract, and the allegedly ultra vires nature of the defendant's conduct, are relied on as an answer to the pleaded defences of consent. Secondly, they are relied on to support an allegation, which was already to be found in the Replies, that the defendants' conduct involved them meddling in matters which were "commercial affairs of the claimant which they had no pastoral or constitutional duty to". Hence, it was pleaded, they had no legitimate religious, moral, or social interest or duty to make the offending communications. The same facts are relied on as affording evidence of malice.

9. The application could not be dealt with at the first day of the PTR, Monday 11 February 2019, because Mr Otuo had only given 1 clear day's notice. He frankly admitted that this was not enough, and did not seek an order abridging time. So, like other applications that were listed for hearing that day, it had to be adjourned. That was highly inconvenient. The court has many demands on its time, which is limited – and increasingly so. If litigants suddenly call for applications to be dealt with on short notice, they inevitably disrupt the process. It can sometimes be justified, but only where something has happened to require a short-notice application.

10. Why was **this** application brought on such short notice in the first place? There is no adequate answer to that. A significant part of the answer, it is clear, is culpable delay on the part of Mr Otuo. On his own account, the evidential basis for the application has been available to him since April 2018. His application was first filed some ten months later, just over one month before the trial, which has been fixed for a considerable time now. One working day's notice was given, before the PTR. He had given no prior warning at all. He is acting in person, but that cannot excuse delay of this kind.

11. Adjournment of the application was in the circumstances, inevitable. As it turned out, it was possible to list the application for a hearing not long after 11 February 2019. I heard it on Friday 15 February. This was inconvenient, as it required a number of aspects of the Court's diary to be reorganised. Mr Otuo is fortunate that this was not just possible, but that the time and trouble was taken to undertake these re-arrangements. Even then, it was not possible both to hear and to give judgment on all the applications that were before me that day. After two days of hearing, I had to reserve judgment on nearly all of those applications, and reserve my reasons on them all.

12. But the adjournment of this particular application has had a number of benefits. First, it has enabled me to read the draft amendments, which was not possible before, as they were only supplied less than 30 minutes before the previous hearing began. Secondly, Mr Otuo has been able to explain more fully his case – although he had an ample opportunity to do that before he filed the Application Notice. Thirdly, it has allowed the defendants to prepare and provide written and oral submissions in response. Finally, and importantly, I have been afforded at least some time to absorb and reflect on all of this. All these are or should be ordinary steps towards a fair and reasoned decision on such an application. The process, as everyone with experience of it knows, makes it essential for the opposite party to be given adequate time to respond to an application and for the Court to be allowed time for pre-reading and preparation. Mr Otuo knows that. Although he is unrepresented, he is a very experienced litigant.

13. In the light of all that I have now read and heard, I have reached the clear conclusion that the application for permission to amend to plead a claim in contract must be dismissed. However, although I have considerable reservations about the merits of these contentions, I will allow Mr Otuo to amend his Replies to maintain that the process leading to his disfellowship was conducted in breach of contract.

Principles

14. Any amendment must of course disclose a reasonable basis for a claim or defence. The Court will refuse permission to make an amendment which is not sufficiently clear, or which raises a hopeless claim, or another contention which is bound to fail. Permission will be refused, indeed, on any ground that would suffice to justify an order striking out a claim, defence or other contention. That must include abuse of process. It must also include non-justiciability, though that is very rarely raised as an issue.

15. It is often said that, subject to these considerations, the Court will ordinarily allow an amendment if the opposite party can be compensated in costs. That would not necessarily assist Mr Otuo, as there is no evidence that he would be able to compensate the defendants for the additional costs that would inevitably flow if permission to amend was granted. In any event, however, it is a misconception to suppose that the Court is bound to allow an amendment if the resulting costs can be paid by the applicant.

16. It is now more than 20 years since the Civil Procedure Rules introduced a "new" culture. Early on, it was established that this is not so. On 2 December 1998, in *Worldwide Corporation v GPT* the Court of Appeal established the principle that a late application which, if allowed, would threaten the trial date, requires justification. A heavy burden lies on the applicant to show why the overriding objective, and justice to his opponent, require the grant of permission. Delay must be explained and justified. The guiding authority today is *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14 [2011] 1 WLR 2735, which approved what had been said in *Worldwide* (a decision relating to events before the CPR). The principles were usefully summarised by Carr J, DBE in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) [38]:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

17. So far as the intended new claim for a remedy for breach of contract is concerned, this is by concession out of time. Mr Otuo concedes that "On the face of it, it would appear that the cause of action accrued on 19 July 2012 when he was expelled as a member of the London Wimbledon Congregation of Jehovah's Witnesses". That is what the defendants say. If that is so, the six-year time-limit thus expired in July 2018, several months after Mr Otuo (on his own account) first became aware of the existence of what he contends is the key contractual document.

18. CPR 17.4 deals with applications for permission to amend in this situation. It provides, so far as relevant:

> "(1) This rule applies where –
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
> (b) a period of limitation has expired under –
> (i) the Limitation Act 1980 ….
> ….
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

19. Mr Otuo maintains that the intended claim does arise out of the same facts or substantially the same facts as the claims which he is already pursuing, and has been pursuing since the first of these slander actions was begun in 2013. He has a fall-back position, which is that the limitation period has not in fact expired because a "fact relevant to [his] right of action has been deliberately concealed from him by the defendant" within the meaning of s 32 of the Limitation Act 1980. His case is that the defendants "deliberately concealed the existence of a binding contract governing the relationship" with him by positively stating to Sir David Eady that there was no contract between the parties.

20. That is a serious allegation against the defendants, which would require cogent evidence before it was even made, and I can presently see none in the evidence before me. It certainly does not follow from what was said before Sir David Eady that the defendants were dishonestly or even deliberately concealing the document on which Mr Otuo now relies. Proof of deliberate concealment would require a great deal more than that. It would seem to require evidence that one or more identified individuals, for whom the defendants are vicariously responsible, was involved with that application, made or knew of the representation made to the Court, and did so knowing that the Constitution existed and with the intention of concealing the existence of that document from Mr Otuo.

21. It is not necessary to resolve this issue, or make provision for its resolution, because the defendants do not dispute that the proposed amendments "arises out of the same facts or substantially the same facts".

22. For the defendants, Mr Brady submits that there are "at least four" reasons why I should exercise my discretion to refuse permission to amend either of the claims: (1)

There was no contract between Mr Otuo and the Congregation and, even if there was, it had nothing to do with his being disfellowshipped as one of Jehovah's Witnesses; (2) the proposed claim is non-justiciable and the relief sought is prohibited by Articles 9, 10, and 11 of the Convention; (3) unjustified delay; and (4) case management; it is said that the introduction of the claim would further complicate both claims, requiring amendments of the defendants' statements of case and additional witness statements which may jeopardize the trial dates.

Application of principles

The claim in contract

23. My provisional view, explained a little more fully later, is that there was no contract on which this claimant can rely against these defendants, in support of a claim for any relief. In any event, none has been sufficiently pleaded as yet. The draft amendments fail to state any reasonable basis for a claim in breach of contract. That is not a provisional view, and I would refuse permission to plead this claim for that reason. I would also refuse it as a matter of discretion, in any event. The application is very late. As will be clear from my summary of Mr Brady's arguments, it raises a host of issues which would undoubtedly complicate and disrupt the progress of the case to trial, and might even threaten the viability of the present trial dates which, it should be recalled, will already be nearly seven years after the relevant events. There is delay since at least April 2018 which is unexplained, or inadequately explained, and in my judgment plainly unjustified. Indeed, it is a striking feature of this application that it could have been made at the substantial hearing before HHJ Parkes QC in June 2018, or at any time in the ten-month period between April 2018 and February 2019, but was delayed until after the exchange of witness statements and just before the PTR.

24. Nothing is pleaded in Mr Otuo's draft amendments that seems to me capable of sustaining a contention that any contract ever subsisted between him and Mr Morley. I am not satisfied that Mr Otuo has yet stated a clear and cogent case as to the formation of a contract between him and the other defendant, Watch Tower. The contract which he asserts is one between him and the Wimbledon Congregation, based upon its Constitution. Neither of the defendants is said to be, or to be a member of, the Congregation. The very brief statement of Mr Otuo's intended case fails to set out any nexus between the Congregation and either defendant which could sustain the attribution to those defendants of liability for breach of contract. The notion of a non-party having acted *ultra vires* the Constitution is a perplexing one.

25. Mr Otuo's witness statement asserts that Watch Tower can be held vicariously liable for the conduct of an unincorporated congregation of Jehovah's Witnesses. He refers to the decision of Globe J in *A v Watch Tower Bible and Trace Society of Britain* [2015] EWHC 1722 (QB) [64-69]. But that was a claim for damages for personal injury and loss arising from assaults by the late Peter Stewart, a member of a Jehovah's Witness Congregation. The doctrine of vicarious responsibility is one that operated there, and principally operates, in the law of tort. It may play a role, where the person who is said to have done the act amounting to a breach of contract is not the defendant, but someone for whose conduct the defendant bears vicarious responsibility. But the defendant to a claim for breach of contract must be a party to the contract which is said to have been broken. Like Sir David Eady, I find it hard to see that a case has been set out or explained, by which an existing defendant in these

actions can be held to account, in a contract claim, for the conduct of which complaint is made.

26. I make these points by way of an expression of provisional views, because these are not points that were argued before me. But even if these provisional views were mistaken, I would still find it very hard indeed to see how the Court could be persuaded to grant the relief which Mr Otuo seeks. The grant of a mandatory injunction is a rare thing, in itself. The grant of any form of injunction to force unwilling parties into an employment or other personal relationship with one another is wholly exceptional. So is a mandatory order compelling a person to make a particular form of statement. All of these are powerful reasons to doubt that Mr Otuo would have any chance of securing the relief he wishes to claim, even before consideration of the Convention right to freedom of religion. The authority cited in my earlier judgment on the Justiciability Issue would seem to indicate that the question of whether a Congregation should be forced to admit or re-admit a member is forbidden territory for the Court. Again, these are provisional views because there was no argument, or only very limited argument, on these points. But for all these reasons, the prospects of a Court requiring the defendants to do what Mr Otuo seeks do seem to me to be remote in the extreme, a factor which lends weight to the decision to refuse permission.

The Replies

27. Despite all this, I take a different view when it comes to the Replies. If, in the light of my provisional views on the lack of merit in his assertion of a contract, and the attribution to these defendants of responsibility for its breach, Mr Otuo wishes to press on with the case set out in his draft amendments to the Replies, I will permit that. In this context, the procedural position is different. The points are circumscribed and quite short, and can be disposed of without too much complexity or difficulty, in my view. But if Mr Otuo does press on, it will be at his risk as to costs, and I will not allow the matter to be dealt with in a disproportionate manner. I will not allow him to adduce any further evidence, to deal with this issue. He has not sought permission to do so. I will allow the defendants to adduce further evidence, if so advised, with a deadline of 1 March 2019. But I will not require them to plead any case in response to the amendments to the Reply. It will be enough for their case to be stated in the trial Skeleton Argument.