



Neutral Citation Number: [2019] EWHC 3563 (QB)

Case No: QB-2019-001414

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Media and Communications List

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before :

MR JUSTICE NICOL

Between :

Charles Elphicke MP
- and -
Times Newspapers Ltd

Claimant

Defendant

Adrienne Page QC (instructed by Carter-Ruck) for the Claimant
Gavin Millar QC and Ben Silverstone (instructed by RPC) for the Defendant

Hearing date: 10th December 2019

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.

.....
MR JUSTICE NICOL

Mr Justice Nicol :

1. On 15th April 2018 the ‘Sunday Times’ published an article under the headline ‘Police Quiz Tory MP Charlie Elphicke after two women allege sex crimes’. On 22nd April 2018 the same newspaper published a further article under the headline ‘Police Failed to tell Tory MP Charlie Elphicke about rape claim: Female aide made allegations five months ago’. On 29th April 2018 the paper published a third article headlined ‘A Tory MP is accused of rape and no one stirs: Police delays [and secrecy] are adding to the distress of both parties.’ (The words ‘and secrecy’ were included in the on-line version of the article, but not the printed version).
2. At the time these articles were published and until Parliament was dissolved on the calling of the 2019 General Election, the Claimant was the Member of Parliament for Dover and Deal. He issued these proceedings on 17th April 2019. He claimed that all three articles were a misuse of private information. He claimed that the second and third articles (i.e. those published on 22nd and 29th April 2018) were libellous of him. The claims are brought in respect of the print and on-line articles.
3. Particulars of Claim were served on 30th May 2019. The Claimant alleged that the words complained of meant that he was guilty of rape.
4. By a consent order (approved by Master Gidden) of 16th August 2019 the trial of a preliminary issue was ordered, namely what natural and ordinary meanings the words complained of in paragraphs 3.2 and 3.3 of the Particulars of Claim bear.
5. The words complained of in the second article (with paragraph numbers added for ease of reference and corrected from those used in the Particulars of Claim) were as follows. (I have added in square brackets other parts of the article which are not included in the words alleged to be libellous) –

‘[1] Scotland Yard was last night facing questions over its handling of a rape allegation made against a senior Conservative MP by a female former member of his staff.

[2] The Sunday Times can reveal that Charlie Elphicke, 47, a former government whip and married father of two, is alleged to have forced a former aide to have sex when they were alone together.

[3] The alleged victim first contacted the Metropolitan police in November last year – at the height of the Westminster sex scandal – and was accompanied to her police interview by Stuart Andrew, a Tory whip. She has since provided a signed witness statement to specialist detectives working for the sexual offences command.

[4] It is understood that officers interviewed the MP for Dover and Deal under caution last month over allegations of “sexual touching”, but did not put the rape allegation to him – months after it was first made.

[5] Last weekend The Sunday Times revealed that Elphicke was under investigation for alleged “sexual offences” involving two female members of staff.

[6] Scotland Yard is facing questions over delays in dealing with the rape allegation.

....

[[Elphicke’s solicitor, Mark Haslam, said: “At no time has any allegation of this nature been raised. In addition, I was present when Mr Elphicke was interviewed by the police and I can confirm that this is the case.]

[[7] “Moreover, had a credible allegation of this nature been made against my client, it is inconceivable that the police would not have questioned him about it by now, over five months later.]

[8] This weekend a leading QC said: “It is important for serious allegations against elected public officials to be dealt with in a swift and timely manner, not only for the sake of the alleged victims, but also for the suspect himself, and his constituents.

[9] “One would expect the police and Crown Prosecution Service (CPS) to make charging decisions as quickly as possible. Justice delayed is justice denied.”

[10] The woman first made her allegation to the Conservative Party in November 2017.

[11] The Sunday Times has a signed statement from the alleged victim in which she claims that she was raped by the MP. “I was explicitly clear I did not want to have sex with him and he was aware of this,” she says. “I was visibly very upset at the time.”

.....

[[12] Elphicke was suspended from the Conservative Party over unidentified “serious allegations” on November 3. On the day the Tory whip was withdrawn, Elphicke tweeted: “I am not aware of what the alleged claims are and deny any wrongdoing.”]

[13] The Sunday Times was unable to identify the rape complainant to Elphicke, or to give details beyond the fact that the incident is claimed to have taken place between 2015 and 2017.

....

[[14] Elphicke has previously said he is “co-operating fully” with the police in relation to the allegations they have put to him and told them that he “vigorously denies any wrongdoing”.]

[15] The rape allegation is the most serious to emerge since a slew of sexual misconduct claims hit Westminster at the end of last year.

[16] After the Sunday Times revealed last weekend that the MP had been questioned under caution over sexual offences a “friend” of Elphicke briefed

another newspaper that the allegations related to “claims of low-level sexual harassment” that were “pretty minor in the scheme of things”.

[17] The friend added that the claims were at a “Michael Fallon level” – a reference to the former defence secretary, who lost his cabinet job last year following claims that he had placed a hand on a journalist’s knee.

[18] However, at least one of the allegations received by police is much more serious.

[19] Earlier this year, Andrew wrote to the alleged victim regarding the complaint of “alleged inappropriate behaviour and non-consensual sex” against Elphicke that she had made to the Conservatives last year.

[20] “I know this is currently part of an investigation,” he wrote. “However, I ... wanted to check that following the statements that you have made to the Met, that you have been able to access the health and wellbeing services that I was keen to arrange for you. If you have had any issues or feel you need any further support, please do not hesitate to contact me.”

[[21] The Westminster sex scandal erupted last autumn after the anonymous online publication of a list of alleged sex pests in parliament. It has already claimed the scalps of Fallon and Damian Green, who was the de facto deputy prime minister.]

[[22] The Tory Party suspended Elphicke four days after the list appeared. He was elected to the House of Commons in 2010. One alleged offence is said to have occurred when he worked as a government whip under the former prime minister, David Cameron.]

[[23] Elphicke’s wife, Natalie, has fiercely defended him, writing in this newspaper in November that he was the victim of “kangaroo courts”. She wrote “As Conservatives we cannot stand by when injustice is heaped on injustice ... When one of our own is thrown to the wolves – is hung out to dry in this manner without even being told of what he is accused.]

[[24] “I cannot begin to describe the hurt and strain, the confusion and fear for me and my family.”]

6. The words complained of in the third article were as follows (again I have added in square brackets the paragraphs of the article which are not alleged to be defamatory of the Claimant),

‘ ...

[[1] There has been a rash of stories about the adventures of Rebecca Trott, the diary secretary to the Tory housing minister Dominic Raab, who has been charging “sugar daddies” £750 for a hot date. Obviously it is conduct unbecoming for a civil servant, which at a stretch might even have security implications, but her case is far more amusing than alarming.]

[2] ...[By contrast] an appalling situation is unfolding under the noses of our legislators at Westminster, involving a Conservative MP who has been accused of rape. That's right. Rape. You won't have heard much about it, though, because – with the exception of this newspaper – few media organisations have dared to mention the “R” word.

[3] The Sunday Times has a signed statement by a former female aide to Charlie Elphicke, the MP for Dover and Deal, in which she claims unambiguously to have been “raped” by him, and has reported the matter to the police.

[4] “I was explicitly clear that I did not want to have sex with him”, she affirmed. “He was aware of this. I was visibly very upset at the time.” We also revealed that a second former member of staff had accused the MP of a further sexual offence.

[5] All of this has been known at the highest reaches of the Conservative Party since November, when the #MeToo movement empowered a number of women to complain about alleged sexual harassment by MPs.

[6] A Tory whip encouraged the former aide to report her alleged rape to the Metropolitan police and accompanied her to a police station on November 7. Elphicke was suspended on the grounds of “serious allegations” made against him. But not until our revelations last week was the severity of the claims against him known. The MP has emphatically denied any wrongdoing.

[7] Everything else about this case is as clear as mud. To the undoubted distress of his alleged victim, police do not appear to have told Elphicke about the rape allegation. Bizarrely, it seems that The Sunday Times was the first to let the MP know last week. His solicitor told us: “At no time has any allegation of this nature been raised.”

[8] Why not? Surely he should have been informed by now. The Metropolitan police won't tell us one way or another whether they have questioned Elphicke about the rape allegation. After the long-running Leveson inquiry into the conduct of the press, police are terrified of giving any guidance to the media, on or off the record.

[9] The woman alleging rape is as much in the dark as we are ... [Yet all this secrecy didn't stop a “friend” of the MP giving a “pre-buttal” of the accusations to a rival newspaper (an incredibly frequent and brazen practice). No sooner had we, quite properly, given Elphicke the time to respond ahead of publication to claims a fortnight ago that he was being investigated for sexual offences against two former staff members than a sanitised version of our story mysteriously appeared in the Mail on Sunday. Coincidence? You decide.

....

[[10] The “friend” of Elphicke told the tabloid that he believed the allegations amounted to no more than “low-level sexual harassment” which was “pretty minor in the scheme of things”. They were, the friend added, at “Michael Fallon” level – a reference to former Tory defence secretary who resigned after it

emerged that he had put his hand on one journalist's knee and "lunged" at another for a kiss.]

[[11] I hope Elphicke's "friend" feels thoroughly ashamed now that he knows one of the former aides has alleged rape – and has given The Sunday Times a signed statement to that effect. There is nothing "low-level" about her claim.]

[[12] Somebody else who was kept in the dark early on is Natalie Elphicke, the wife of the accused Tory MP. She wrote a moving article for us in November after her husband was suspended by the Conservative Party. Tragically, a Labour member of the Welsh Assembly, Carl Sargeant, had just taken his own life after he was sacked for sexual misconduct without being told of the specific allegations against him.]

[[13] "Rushing to judgment has led to the death of one man who lived to serve those who elected him," Mrs Elphicke wrote. "It must not be allowed to lead to any more." The mother-of-two said she could not "begin to describe the hurt and strain, the confusion and fear for me and my family" and pleaded with Theresa May to halt the "kangaroo courts".]

[14] Mrs Elphicke was distressed that the Tories had seemingly told the media that her husband had been suspended before they had troubled to inform him. Police appear to have behaved equally badly towards the MP, since his solicitor says they have yet to tell him of the rape accusation.

[15] Even worse must be the anguish suffered by the woman who went to the police, who does not know when or even if officers will put her claims to Elphicke.

[16] If there were any excuse for secrecy and delay in the past, there is none now. As a leading QC told us last week, "One would expect the Crown Prosecution Service to make a charging decision as quickly as possible. Justice delayed is justice denied."

[17] Six months will have passed next week since the alleged victim went to police. This is a disgraceful state of affairs. Too many people – the accused MP, members of his family and his accusers - have been left in legal limbo.'

7. As I have said, it is the Claimant's contention, advanced by Adrienne Page QC, that the words complained of meant that he was guilty of rape. The Defendant has not yet been required to put in a defence. Master Gidden also ordered that the time for a defence was extended until 28 days after the determination of this preliminary issue. However, in his skeleton argument for the present hearing Mr Gavin Millar QC, on the Defendant's behalf, contends that both the second and third articles meant that there were grounds to investigate whether the Claimant had committed rape.
8. Translated into the familiar categorisation adopted by Brooke LJ in *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 11, [45], Ms Page was arguing that the words complained of had a *Chase* level 1 meaning (guilt of the alleged conduct). Mr Millar contended that they had a *Chase* level 3 meaning (grounds to investigate). The intermediate level, *Chase* level 2, is that there are

reasonable grounds to suspect the Claimant of the conduct in question. I recognise that these are not hard and fast categories and, indeed I am not bound to accept either party's meaning, save that I cannot find a meaning that is more detrimental to the Claimant's reputation than the Claimant alleges.

The applicable principles

9. The essential principles were not in dispute between the parties. They have been summarised recently by Nicklin J. in *Koutsogiannis v Random House Group* [2019] EWHC 48 (QB) at [12] as follows:

- i) The governing principle is reasonableness.
- ii) The intention of the publisher is irrelevant.
- iii) The hypothetical reasonable reader is not naive 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 naive.
- 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 (e.g. 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).'

The parties' contentions

10. It was common ground (as principles viii) and ix) make clear) that the meaning of the words complained of must be judged in their context. Thus, the surrounding words, even though not themselves alleged to be libellous, must be considered. Other aspects of the 'context' on which Ms Page relied was that these were articles in a serious newspaper whose readers would accordingly take its allegations seriously. The second article was published prominently on the front page of that issue of the Sunday Times which also added to the importance that the newspaper gave to it. The third article was a comment piece. She relied as well on the headlines and sub-headings which I have already quoted.
11. Ms Page also relied on what Nicklin J. said in *Petro Poroshenko v BBC* [2019] EWHC 213 (QB) at [26],

'Publications that result in a meaning at 'Chase' level 2 or 3 tend to flag clearly to viewers/readers that there are reasons why they should be cautious before accepting allegations made by others, perhaps for motives of their own, for example.'
12. While Ms Page recognised that the 'bane' and 'antidote' must be taken together, she submitted that, in the case of these two articles, there was here an abundance of poison and precious little antidote. She drew attention to the headlines of each article. The second article (i.e. the first alleged to be libellous) referred to 'rape' in the headline and repeated the word (or its derivative) more than six times. These were examples of a publisher having to take responsibility for repeating a defamatory slur in accordance with the well-known 'repetition rule'. This was not an example of the article reporting a police investigation into an alleged offence (as in *Lewis v Daily Telegraph Ltd* [1964] AC 234 HL). On the contrary, the rape allegation is 'revealed' to readers and the complaint is that the police were *not* investigating the allegation as they should.
13. That the readers should take the allegation to be true is supported by a number of features of the article:
 - i) They are told that the alleged victim was accompanied to her interview with the police by Stuart Andrew, a Conservative Party whip.

- ii) She had provided a signed witness statement to specialist detectives.
 - iii) That Stuart Andrew had subsequently offered the woman pastoral support.
14. Ms Page argued that this second article contained no denial by the Claimant of the rape allegation. Such response as was reported was a general denial of wrongdoing by the Claimant's solicitor, and even that was tempered by the comment of a 'leading QC' treating the omission to put the allegation as a mark of a failing by the police rather than as raising doubt over the credibility of the complainant. The denials of the Claimant to any wrongdoing were presented as historic denials rather than addressing specifically the allegation of rape. Ms Page submitted that the impact of these historic denials was further diluted because the 'friend' of the Claimant had dismissed the complaints as low-level sexual harassment. Likewise, the reported defence of the Claimant by his wife was historic and did not address the serious allegation of rape.
15. Ms Page submitted that the third article also straightforwardly accused the Claimant of rape. Its headline was striking. Again, there were frequent uses of the word 'rape' or its derivatives. The statement of the complainant was described as an allegation 'unambiguously' of rape. The reference to the #MeToo movement in paragraph 5 also lent endorsement to the validity of the allegation. As with the second article, the third article contained barely any antidote to the bane.
16. Mr Millar submitted that the primary focus of the second article was criticism of the Metropolitan Police and their failure properly to investigate the complainant's allegations. That was made clear by the headline to that article. It was necessary for that purpose to explain what the complainant's allegation had been, but it is also made clear that the police did not consider the allegation to be meritorious. Little had been said about the complainant other than she was on the Claimant's staff. The reasonable reader would also recognise that the allegations against the Claimant had been made in November 2017, but such allegations as were put to the Claimant were not put to him in interview until March 2018. The Claimant's solicitor was quoted as confirming that the Claimant had not been interviewed about the rape allegation. Mr Haslam was also quoted as saying in effect that the failure of the police to do that showed that they doubted the complaint was credible. Strong denials from the Claimant himself were quoted. The Sunday Times explained why it could not give the Claimant chapter and verse of the rape allegation and therefore the general nature of the denials would not diminish their force. All this supports the Defendant's case that the thrust of the article was that the rape allegation called for investigation.
17. Mr Millar made similar submissions about the third article. The Claimant's solicitor is again quoted. His strong denials are repeated. Both articles also refer to Mrs Elphicke's vigorous defence of her husband. The third article treats the Claimant and his family with sympathy.

My conclusions as to the meaning of the articles

18. In my view these two articles bore *Chase* level 2 meanings i.e. the thrust of both articles was that there were reasonable grounds to suspect the Claimant of rape. I agree with Mr Millar that neither article was saying simply that the Claimant had raped the complainant. However, the two articles were critical of the way in which the police had handled her complaint. The premise of such criticism was that this was not

a complaint which should have been dismissed without the Claimant even being asked for his response. The failure of the police to question the Claimant about the complainant's allegation led the anonymous QC to repeat the comment that 'Justice delayed is justice denied.' But the premise of this is also that the complainant's allegation of rape should not have been dismissed as incredible. I do not accept that these articles had no more than a *Chase* level 3 meaning, that these were matters which ought to have been investigated. The reasonable reader would have taken away the message that her complaint was not groundless or without reasonable support. Otherwise there would have been no cause to criticise the police for their handling of the complaint of rape.

19. Likewise, the obvious indignation of the author of the third article would lead the reader to conclude that the police were at fault because they had not investigated a complaint of rape in the thorough method it deserved. Again, had the complaint been obviously without foundation, the reader would conclude that there would have been a good and obvious reason why the Claimant had not been questioned about it. Both articles referred to the *Sunday Times* having been given a signed statement from the complainant. The reader would see those references as being included because they lent support to the complaint (I emphasise I am dealing only with meaning, rather than with whether such a statement did add support).
20. I also agree that the support offered by Stuart Andrew (one of the Tory whips) by going with the complainant to her police interview and by offering pastoral support would be understood by the ordinary reader as underlining that there was some substance to this complaint and would be understood as lending further force to the criticism of the police for not properly investigating her complaint. Mr Millar makes the point that the complainant is described as a former 'aide'. Since the article referred to the Claimant's position as a former government whip, Mr Andrew's involvement may reflect the solicitude of a person in the position of employer, but I agree with Ms Page that these references did add to the message that the ordinary reader would take away, namely there was here a complaint which had an objective basis. The third article made sympathetic reference to Mrs Elphicke's defence of her husband, but this was on the basis that he had 'been hung out to dry without even being told of what he is accused'. This added to the thrust of the second article, namely criticism of the police handling of the complaint.
21. That said, I do not agree with Ms Page that the ordinary reader would understand these articles to make an allegation that the Claimant was guilty of rape. The references in the articles to the complainant's 'claims' and 'allegations' to having been raped, of course, do not necessarily protect the Defendant against a *Chase* level 1 meaning as the repetition rule makes clear, but, at the same time, the use of these words is part of the factual matrix from which the reader will take away the ordinary meanings of the articles. I agree with Mr Millar that the reference to her complaint having been 'unambiguously' of rape would be seen by the reader as a refutation of the suggestion that her complaint was to be characterised as being of low-level sexual harassment, rather than an unambiguous endorsement of the truth of her complaint. I also disagree with Ms Page that the ordinary reader would regard the Claimant's denial of any wrongdoing as formulaic and of little value in consequence. The paper had made clear that the rape allegation had not been put to the Claimant in his police interview and the newspaper itself could not give detail of the allegation without

imperilling the complainant's anonymity. His denial of 'any wrongdoing' would plainly embrace rape, in any event, but especially so in those circumstances. I do not therefore accept her characterisation of the articles as all bane and no antidote.

Conclusion

22. I would recast slightly the nature of the trial I conducted from the terms of Master Gidden's order of 15th August 2019, paragraph 2.
23. The meaning of the words complained of in paragraph 3.2 of the Particulars of Claim in the context of the article of 22nd April 2018 when taken as a whole is that there were reasonable grounds to suspect that the Claimant was guilty of rape.
24. The meaning of the words complained of in paragraph 3.3 in the context of the article of 29th April 2018 when taken as a whole is that there were reasonable grounds to suspect that the Claimant was guilty of rape.