Court of Appeal Reference: A2/2005/1093

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Lower Court Reference:
Claim No. HQ03X03360

BOGDAN STEFAN MARIS a.k.a ALIN TURCU

Claimant/ Appellant

- and -

NEWS GROUP NEWSPAPERS LIMITED

Defendant/ Respondent

CLAIMANT'S FOURTH SKELETON ARGUMENT

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1. C has previously filed three skeleton arguments in connection with this appeal. The first on 31 May 2005, before the emergence of the evidence of Florim Gashi ("FG")[1]; the second on 30 September 2005, relating to that evidence[2] and the third on 27 April 2006[3]. The latter was at the invitation of Rix LJ and related to R v Martins, a prosecution that arose from another Mazher Mahmood ("MM") "sting operation", at which FG gave evidence for the defence. The permission hearing was deferred at D's request until after the determination of an application by the defendants in Martins to stay the prosecution as an abuse of process. The actual trial in Martins took place in July 2006, several weeks after the permission hearing. FG gave evidence over the course of several days. The defendants were all acquitted. It is not known whether the jury accepted the evidence of FG, in whole or part, but there is nothing to suggest that it was rejected.

2. The purpose of this skeleton is to cover matters that have arisen since those skeleton arguments were filed, in particular:
   2.1. The permission hearing.
   2.2. Fresh evidence relating to the "gun video".
   2.3. D's contention that FG's evidence was available before trial to C.
   2.4. The Amended Particulars of Claim and C's case on MM.
   2.5. Cross-examination at the appeal.

[1] File 1, Tab 10
[2] File 1, Tab 8
[3] File 3, Tab 1

2.6. Matters relating to conditional fee funding and after the event insurance.

It is not intended to repeat the contents of the previous skeleton arguments.

Reading list

3. A complete set of the video and audio recordings have been made available to the Court and there will be facilities for them to be played at the appeal, if required. Three sets of the most significant recordings have also been provided. These are CGB10 (the recruitment of Jaws and the gun, lasting around 10 minutes), CGB11 (the visit to the Beckham's home, also lasting around 10 minutes), and CGB7 (dinner at the Atoca restaurant, lasting around 20 minutes). They were viewed by Rix and Moses LJJ and were evidently a significant factor in permission being granted. Even without the benefit of FG's evidence, CBG10 and 11 appear totally artificial, stage-managed and inconsistent with any serious criminal plan. CGB7 is relevant because it is the only time that the "gang" were present at the same time and was heavily relied on by D as evidence of the kidnap plot and C's involvement in it. The recording shows a raucous Saturday night out in a busy South London restaurant. It was described by the Judge as "loud, indiscreet, jocular and completely non-productive".

4. The Court is also asked to consider the following documents:
   4.1. The articles complained of[4] and the subsequent references by D to the kidnap plot.[5]
   4.2. The statements of case and draft Amended POC.[6]
   4.3. The witness statements for the trial[7] and appeal[8] including the statements served after the permission hearing (C's third statement, Robin Hallsworth, Dominique Morris, Helen Morris and DI Horrocks).[9] D's witness statements are of limited value because they are primarily concerned with whether the publications complained of were published in good faith, not whether they were true (see paragraph 11 below).

5. A complete set of the transcripts of the various recordings can be found in File 2. However, it is submitted that the actual footage is a more accurate guide to their evidential value. The relevant parts of the transcripts are identified in the second skeleton argument. It is common ground that discussion of the kidnap plot only arises

[4] File 1 tabs 16-17.
[5] File 3, Tab 10.
[6] File 1 tabs 18-21.
[7] File 1 tabs 22-36.
[8] File 1, tabs 2-7 and Respondent's Bundle, tabs 1 & 2.
[9] These are in File 3 tabs 13-17.

when the subject is raised by FG. If necessary, C can make good the submission that FG's evidence is entirely consistent with the transcripts.

6. A bundle of authorities was lodged with the first skeleton argument. A second bundle was lodged with the second skeleton argument, relating primarily to the principles governing the admission of fresh evidence. The Court should have three sets of both bundles.

The permission hearing

7. The application for permission to appeal was made before the emergence of FG's evidence. The original grounds (1 & 2 in the amended Notice of Application) related to the Judge's finding that the publications complained of were substantially true. It was alleged, among other matters, that the Judge had misdirected himself in relation to his approach to the evidence. At the hearing on 26 May 2006, the Court gave permission to appeal in relation to the evidence of FG (ground 3), but adjourned to the substantive appeal the application in respect of grounds 1 & 2. In the event that ground 3 succeeds, grounds 1 & 2 become academic.

Fresh evidence relating to the gun video

8. For the reasons set out in the second skeleton argument, the footage of Dr Adrian Pasareanu ("AP") with a gun in CGB10 is of considerable significance to the case. Put shortly, if this scene was a set-up, the whole kidnap plot was a set-up, because no serious kidnappers would indulge in such play-acting. In FG's statement he alleged that the gun was provided to him by Robin Hallsworth. Following the permission hearing C's solicitors traced Mr Hallsworth and he provided a detailed corroboratory statement, the accuracy of which D does not contest.[10] In the circumstances, it is plain that, contrary to what was assumed by the Judge, the gun featured in the video was not AP's. It was FG's and was provided to AP solely for the set-up. This evidence alone passes the three Ladd v Marshall requirements, it is not dependent on FG's credibility and is sufficient, of itself, to justify a new trial.

D's contention that FG's evidence was available before trial to C

9. D did not make any written or oral submissions in opposition to the grant of permission, although its representatives were in attendance at the permission hearing. It was nevertheless anticipated that in approaching the Ladd v Marshall requirements, the

[10] File 3, Tab 6, page 167

credibility of FG's evidence would be a relevant factor. Accordingly, the issue was addressed in detail in the second and third skeleton arguments. It appears from correspondence arising after the permission hearing that D seeks to contend, in the alternative, that FG's evidence was available to C's solicitors before trial. This matter was only addressed in passing in the second skeleton argument because it seemed obvious that FG's evidence was not available.[11] D has now served a witness statement from DI Horrocks[12], in which he claims that if C's solicitors had asked him he would have passed a message to FG. Despite numerous requests in correspondence, D's solicitors have yet to explain the basis upon which it is alleged that C's solicitors fell short of what could be reasonably expected of them and how the fresh evidence of FG would have been forthcoming before the trial, even if DI Horrocks had told FG that C's solicitors wished to speak to him. In response to DI Horrocks' statement, a statement has been served by Helen Morris[13] of C's solicitors. D apparently wishes to cross-examine Ms Morris.

10. The short answer to D's submission is that there is no duty on a solicitor to obtain a statement from a witness in the "opposite camp", certainly not without some indication that he would be willing to change "camps".[14] In fact, it is inappropriate even to contact such a witness with a view to obtaining a statement in opposition to the one that the witness has already made. There is a further point. D has belatedly disclosed telephone records, showing regular contact between MM and FG around the time of the trial in April 2005.[15] It appears that FG was still working for him at the time. FG left the United Kingdom in June 2005 and in September 2005 made contact with Roy Greenslade of The Guardian. There is therefore no reason to believe that, even if contact had been sought, FG would have agreed to meet C's solicitors, let alone volunteer to give evidence against MM.

The Amended Particulars of Claim and C's case on MM

11. At the trial it was alleged that MM either knew that the kidnap plot was a set-up or did not care whether it was or was not. This was relevant to C's claim for aggravated and exemplary damages. However, MM's state of mind was (and remains) irrelevant to the determination of the justification defence. In support of the application for permission to appeal, it was submitted by C that FG's evidence on justification could not be

[11] File 1, Tab 8 at [10].
[12] File 3, Tab 17.
[13] File 3, Tab 16.
[14] See Bills v Roe [1968] 1 WLR 925 referred to in the second skeleton argument.
[15] File 3, Tab 11.

contradicted by MM or any other witness on D's behalf. Furthermore, in order to narrow the issues, it was indicated that in any new trial C would not seek to put in issue MM's state of mind at the time of publication. At the request of D, draft amended Particulars of Claim have been served, setting out the case that C would advance at any new trial.[16] D has consented to the amendments. [17] In addition, a witness statement has been served by C setting out the evidence that he would give at any new trial.[18]

12. Accordingly, the evidence that C seeks to adduce from FG is limited to the existence of the set-up, not whether MM was the instigator or was party to it.

Cross-examination

13. At the permission hearing Rix LJ contemplated a three day appeal hearing, with up to one day for the cross-examination of FG. No formal application to cross-examine has been made. C's primary submission is that, in the context of the covert recordings and other evidence, FG's witness statement alone discloses apparently credible evidence, such as to justify a new trial. In this regard, it is noteworthy that developments since the permission hearing have bolstered its credibility. His evidence has been corroborated by Robin Hallsworth and the telephone records of contact between FG and MM at the time of trial. His willingness to attend the Martins trial and face lengthy cross-examination with no benefit to him (and at considerable detriment[19]) is evidence of his sincerity and commitment. In addition, D persists in its refusal to give disclosure of the financial documentation that was made available to the defence in Martins. It is reasonable to infer that such documentation is consistent with FG's evidence.

14. Alternatively, C submits that FG's evidence cannot be dismissed as not apparently credible without cross-examination. D's stance is that if FG's witness statement is admitted in evidence, it wishes to cross-examine him as to its apparent credibility.

15. In the event that FG is cross-examined it would be open to the Court to accept his evidence as being true, not merely apparently credible, to such an extent as is necessary for the justification defence to be rejected and for judgment to be given in C's favour without a new trial.

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[16] File 1, Tab 19
[17] File 3, Tab 6, page 176
[18] File 3, Tab 13
[19] FG's permission to enter the country was conditional on his detention throughout the time when he was required to give evidence. The same applies to his attendance at this appeal.

16. It is C's intention to attend the appeal. D has indicated that it does not wish to cross-examine him on any of his three witness statements.

Matters relating to conditional fee funding and after the event insurance

17. The funding of C's claim was referred to in the judgment, the media reporting of the judgment and by Lord Hoffman in Campbell v MGN [2005] UKHL 61 where he referred to the "blackmailing effect" of CFA claims brought by an impecunious claimant without ATE insurance. C's primary submission, as set out in the first skeleton argument, is that the funding of his claim is not relevant to the issues that properly fall to be determined at this appeal.[20] Alternatively, it is not a reason for depriving him of a new trial, where such a trial is justified on the evidence. However, if necessary, C's legal representatives are willing to address any issues relating to the funding of this litigation or CFA funded litigation in "publication" cases in general. The "blackmail effect", if it exists at all, could be said of many defamation claims. It is commonly the case that a defamation claimant is unable to meet the massive costs of the wealthy media defendant if his claim fails. Insofar as this issue is considered to be relevant, the Court is asked to bear in mind the following matters:

    17.1. C's solicitors ("DPSA") have offered a protocol to all media defendants for the conduct of CFA litigation. Under the protocol there would be a mutual costs cap of £200,000 (inclusive of success fee) and ATE insurance would be available to all claimants, including those who were impecunious. The availability of ATE is as a result of a scheme agreed between DPSA and Law Assist whereby the costs of the premium form part of the insured risk. Furthermore, the policy does not become invalid in the event that the claimant's evidence is rejected at trial. Despite a number of requests, D has not been willing to enter into any negotiations with DPSA in relation to the protocol. This is in contrast to the attitude of other media defendants. The protocol has been agreed with the BBC and negotiations are ongoing with others.

    17.2. Pursuant to the insurance scheme, C has been offered ATE insurance to cover D's costs of any new trial. D has not indicated whether it wishes such insurance to be obtained.[21]

    17.3. No application or request was made by D for a costs cap in this case.

    17.4. C has made an open offer of settlement on reasonable terms as to costs.[22]

[20] File 1, Tab 10
[21] File 3, Tab 6, page 177
[22] File 3, Tab 6, page 186c-d

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