IMPRESS ARBITRATION SCHEME CASE NO. 132130163

DENNIS RICE (COMPLAINANT)

v

BYLINE MEDIA, (RESPONDENT PUBLISHER)

ARBITRATION AWARD

Background

1. The claim has been brought by Mr Dennis Rice (the "Claimant") against Byline Media (the "Publisher"). Originally the claim was brought under three heads:

   (a) Defamation
   (b) Harassment
   (c) Malicious falsehood.

2. The claim relates to two Tweets posted from the Byline Twitter account on 6 March 2017 which the Complainant alleges are inter alia libellous.

3. The Tweets arose in the context of an ongoing Byline investigation into, amongst other things, allegations that the Daily Mail employed Mr Steve Whittamore (a private investigator) after he was convicted of "blagging". "Blagging" is slang for unlawfully obtaining private data.

Procedure

4. The arbitrator, Mr Clive Thorne, was appointed on 7 April 2017 by the Chartered Institute of Arbitrators, administrators of the IMPRESS scheme under the IMPRESS Arbitration Scheme Rules. The Panel has been mindful of its obligations under the Rules to conduct the arbitration with "minimum formality" and to adopt an "inquisitorial process".

5. By letter dated 10 April 2017 the arbitrator requested, pursuant to Rule 16 of the IMPRESS rules that the Claimant should set out in written form the allegations of fact relied upon and that within fourteen days of service by the Claimant, the Publisher should set out in written form the extent to which the allegations of the Claimant are accepted. Service of these document was undertaken by the parties and which provide the basis of the claim and defence to the claim.

6. A telephone directions hearing took place on 15 May 2017 when the parties agreed that the arbitration shall be decided on the basis of the parties' written submissions. Also, the Claimant, if he so wished, could have leave to submit a Reply to the Respondent's submissions. The Claimant subsequently served a Reply.

7. Pursuant to Rule 20 of the Rules, the Panel raised the possibility of settlement of the issues with the parties. No settlement has been reached.

8. Following the directions hearing, the Claimant indicated that he would not pursue the claim for harassment and malicious falsehood so that the claim has proceeded on the basis of a claim for defamation only.

Facts

9. The Claimant, Mr Dennis Rice is the sole employee of Dennis Rice Media Limited. He works as a freelance television producer and PR consultant. His company had, most recently, an annual turnover of £125,115.00. He began his working life as a journalist in 1989 and worked in the print industry until August 2008 when he resigned from his position as the Investigations Editor of "The Mail on Sunday" to go freelance. He has been nominated for numerous awards and in 2008 was runner-up in the Journalist of the Year category at the British Press Awards.

10. Since 2008 he has worked in broadcasting, producing television programmes for Channel 4's Dispatches, the BBC, and Discovery Channel among many others. He takes the view that any defamatory material posted about him online will damage his standing not only as a journalist but also in another profession for which he is training.

11. The Publisher, Byline Media, has been conducting an investigation into the allegedly widespread practice of "blagging" confidential details in the British press. In particular, it has been conducting an investigation into the use of private detective, Steve Whittamore by the Daily Mail and other Associated Newspapers in the two years after his conviction in 2005 for unlawful access to personal data. It is accepted by the parties that "blagging" refers to unlawfully obtaining private data. This is, inter alia, a criminal offence under Section 55 Data Protection Act 1998. Articles published by the Publisher as part of its investigation allege that the editorship of the Daily Mail paid Steve Whittamore to obtain unlawfully peoples private information for that newspaper.

12. The Publishers' investigation is ongoing. The first article was published on 3 March 2017, entitled "Part 1: Daily Mail faces fresh blagging scandal". Three subsequent articles have been published as part of this investigation on 4, 7 and 17 March 2017. They are not attributed to a specific journalist but are published under the Byline Investigations byline.

13. The Tweets complained of by the Complainant were published on the Byline Media Twitter account on 6 March 2017 ("Twitter handle at Byline-Media"). It is not disputed that the Tweets were then re-Tweeted by six other Twitter accounts which had a significant number of followers. The Claimant asserts that collectively the Tweets were potentially viewed by a significant number of people (potentially over 54,000) and subsequently appeared on Google which would have increased the viewing of the Tweets further.

14. The Tweets complained of are as follows:

Tweet 1

"***Byline*** *@Byline... 06/03/2017*

High on #blaggingscandal PI Steve Whittamore's top contact list - AFTER charging - is @Dennisricemedia's phone number and email"

Tweet 2

"***Byline*** *@Byline... 06/03/2017*
If anyone else remembers @Dennisricemedia tabloid trolling #leveson witnesses and @Byline_Media journos we have new evidence might explain"

15. The Claimant's complaint in relation to Tweet 1 is the reference to him as "top contact of a convicted blagger". In relation to Tweet 2, his complaint is the reference to "tabloid trolling". "*When the Tweets - posted three minutes apart - are paired against me anyone reading them is left with the clear and false impression that I trolled witnesses to the Leveson inquiry in order to cover up the fact that I was a "top contact of Whittamore"*".

16. The Claimant regards the Tweets as part of a "personal vendetta" by Mr Jukes of the Publisher in which "*he is exploiting the following in resources of a publicly funded media company to do me real and lasting harm*".

17. In response the Publisher takes, inter alia, the view that the meaning of Tweet 1 is factual because the Claimant's name, phone and email address appear on a list dated 2007 prepared by Mr Whittamore.

18. The Panel has seen the list which refers simply to:

"Dennis Rice, Crime

Dennis.rice@mailonsunday.co.uk 07921 xxx xxx"

This is under the subheading "Mail on Sunday" in the list. (The number has since been redacted.)

19. The Publisher submits that the list is not a list of "targets" but on Mr Whittamore's own admission merely a list of his "customers" of the Associated Newspapers Group. The Publisher states the Complainant's name also appears on a 2003 contact list which was seized during a raid by the Information Commissioners Office.

20. In relation to Tweet 2, the Publisher also states that the meaning is a factual one; that the Claimant has consistently targeted critics of the tabloids including witnesses to the Leveson enquiry and the Publisher's journalists. The Claimant's Tweets and posts have gone far beyond robust criticism satire or even banter, into unequivocal "trolling".

21. At the directions hearing, the Panel asked that the parties specifically set out what they understood by "trolling". The Claimant states that the phrase "*is employed in a derogatory sense against print journalists who have a different opinion other than his (Mr Jukes) own i.e. he is a Twitter user and they are just a troll*".

22. The Publisher describes "tabloid trolling" as a form of interference with communication whereby "trolls" would disrupt and derail the exchange of information and rational debate. Most obvious of these strategies was the personalised attack (often called an *ad hominem* but more correctly an *ad personam fallacy*). The classic metaphor was the professional foul "playing the man not the ball". More often than not, trolling seeks to evince an emotional reaction rather than a reasonable exchange of views.

> "*Unlike banter or fair comment, trolling is disruptive and upsetting, but generally stops short of any kind of unlawful activity*".

> "*With the widespread adoption of social media the concept of trolling has become familiar to most of the public. As that happened, many people noticed that the front pages and columns in Britain's tabloids had similar formula: headlines declaring judges "Enemies of the People" and focussing on the lifestyle of members of the Supreme Court, conducting investigations into the background and personal histories of public figures who took opposing points of view. This became particularly acute in the years since the phone hacking scandal and the Leveson enquiry where critics of the British tabloid press intrusion - from academics to sports stars were often subjected to more intrusion or attacks on their character and lifestyle.*"

> "*Tabloid trolling therefore describes a distinctly British cross-over between print and internet culture*".

23. In its response, the Publisher summarises "some of the evidence which in its view evidences a "*five years history of trolling Leveson witnesses*", Byline journalists and other tabloid critics by Mr Rice, this includes:

    (a) an alleged personal attack by the Complainant on Express journalist Richard Peppiatt;

    (b) a threat to report a Leveson witness, Mr Steve Nott to the police. He was apparently described as a "*mentally ill imbecile*" and a "*delusional nut*";

    (c) Mr Tim Fenton who received emails in 2014 from Mr Rice demanding immediate deletion of his posts and threatening a defamation claim;

    (d) Mr James Dolman who had been falsely accused by the Complainant being reprimanded by a judge for his court reporting;

    (e) Mr Dan Waddell a Byline journalist who was the subject of an email in January 2015 for replying to one of the Complainant's Tweets;

    (f) Mr Peter Jukes, CEO of the Publisher who was regularly criticised by the Complainant and a tabloid troll referred to as "*nutter*", "*thief*", "*liar*" guilty of fraud;

    (g) Dr. Evan Harris described as a "*gutless six form prefect*"; and

    (h) Mr Mark Mcandrew subject to a year long investigation by Mr Rice.

24. In his reply the Claimant refers specifically to Mr Waddell, Mr Peppiatt, Mr Nott and Mr Jukes.

25. In the case of Mr Waddell, he exhibits an exchange of emails dated 17 January 2015 in which Mr Waddell writes to the Claimant:

> "*Nice to hear from you. I seem to remember us arguing the toss quite a lot on Twitter a while back. Or did I imagine it?*"

26. This exchange of emails in the arbitrator's view is not hostile nor "threatening".

27. The Claimant exhibits a Tweet from Mr Peppiatt and states the he has Tweeted abuse about the Claimant on multiple occasions but never has it been in response to the Claimant trolling him.

28. He exhibits a Tweet from Mr Nott making a complaint by the Claimant in relation to a possible criminal investigation by Holborn police.

29. In summary, Mr Rice asserts that:

> "*I could go through each and every one of the individuals cited by Byline as apparently being trolled by me and show that all the exchanges are in a response from me to something defamatory or abusive they have posted in the first instance about me. However, since Byline has produced no evidence of trolling, I see no point in attempting to counter non-evidence*".

30. The Publisher also produces evidence that Mr Rice was the source of the "@tabloidtroll" account. It particularly refers to a recent post "How to take down an internet troll" in which Mr Rice apparently admits having "fed a series of articles to this anonymised blog".

The law

31. The Parties rely upon a recent decision of Warby J. in Jack Monroe -v- Katie Hopkins (2017) EWHC433. This is a helpful decision with parallels to the current dispute and is the judgment following a trial of a libel action arising from two Tweets sent by the Defendant, journalist Katie Hopkins, about the Claimant, Jack Monroe. The complaint was that the Tweets accused the Claimant of vandalising a war memorial and desecrating the memory of the servicemen remembered by the memorial. The Defendant, Katie Hopkins argued that the Tweets did not bear the meanings complained of and were not defamatory of the Claimant in the case because it has not been shown that they cause serious harm to the Claimant's reputation as required by Section 1 Defamation Act 2013. The decision helpfully summarises the relevant aspects of the current law of defamation:

    31.1 libel consists of the publication by the Defendant to one or more third parties of a statement about the Claimant which has a tendency to defame the Claimant and causes or is likely to cause serious harm to the Claimant's reputation;

    31.2 Whether a statement about the Claimant has a defamatory tendency is determined according to common law principles... In short the answer

depends on a) the single meaning that will be conveyed by the statement to a hypothetical ordinary reasonable reader; and b) whether that meaning is one that would tend to have a substantially adverse effect on the way that right thinking members of society generally would treat the Claimant;

As this summary suggests, the answer is arrived at objectively and not by reference to evidence to what people actually thought the statement meant or how they reacted in the fact.

31.3 Most cases turn on the natural and ordinary meaning that the ordinary reasonable reader would take from a statement...;

31.4 A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the Claimants reputation. Section 1 Defamation Act 2013. This provision ("The Serious Harm Required") means that it is not enough to prove that a statement had a defamatory tendency. A Claimant must prove as a matter of fact that their reputations suffered, or is likely to suffer serious harm as a result of the publication complained of.

32. The decision is also authority for the proposition that in principle Tweets can be defamatory.

Discussion and findings

The meaning of the Tweets

33. As in Monroe, the Panel must first decide the meaning of the Tweets i.e. the meaning that will be conveyed by the statements in the Tweets to a hypothetical ordinary reasonable reader. In the Panel's view, both Tweets have a factual meaning.

34. The Panel finds that the following "natural and ordinary meanings were borne by the Tweets. In the case of Tweet 1, it is whether the Claimant was part of the "blagging" scandal by virtue of appearing on the 2007 contact list. In the case of Tweet 2, it is whether there was recollection of "@Dennisricemedia" tabloid trolling Leveson witnesses and @byline-mediajournos".

35. As in the case of the Monroe judgment, the Panel takes the view that the two Tweets complained of should be considered together because they were published in close proximity.

36. Having decided the meaning of the Tweets, the next issue is whether the meanings have a defamatory tendency in that they would tend to have a substantially adverse effect on the way that right thinking members of society generally would treat the Claimant. This is an objective test.

37. The Monroe case also recognises that in considering "natural and ordinary meaning" that there may also be an "innuendo" meaning so that an otherwise innocent statement may be defamatory or an otherwise defamatory statement innocent.

38. Did the Tweets meanings have a defamatory tendency?

39. The Argument put by the Claimant is that both Tweets infer that he was engaged in criminal activity. In the case of Tweet 1 he was party to breaching the Data Protection Act by using a convicted criminal (Steve Whittamore) to blag private data. In the case of Tweet 2 that he harassed witnesses to the Leveson Inquiry "to cover up my criminality". He also maintains that as in the case of Monroe the Tweet's were posted a short time apart and that they should be read in the context of each other.

40. The Publisher maintains that both Tweets are accurate in meaning and substance, and in the case of Tweet 1 the Claimant was one of Mr Whittamore's top contacts and therefore involved in the blagging scandal. In the case of Tweet 2 the Claimant has "consistently targeted critics of the tabloids including Leveson witnesses" and that his Tweets constitute "unequivocal trolling".

41. The Panel, following Monroe, has to put itself in the position of the "ordinary reasonable reader" of the Tweets. It finds as follows.

42. In the case of Tweet 1 that the Claimant was a top contact of Mr Whittamore who was charged with blagging. In the case of Tweet 2 it is a clear reference to the Claimant tabloid trolling Leveson witnesses and Byline-Media Journos with the underlying assumption that the Claimant (in order for "anyone else to remember") had been engaged in tabloid trolling.

Defamatory Tendency

43. Did the Tweets' meanings have a defamatory tendency?

44. A helpful authority referred to in Monroe is the judgment of Tugendhat J. in Thornton v Telegraph Media Group Limited (2010) EWHC 1414 (QB) where in a summary of "personal defamation" he concluded:

> *"Imputations as to what… would perhaps now be expressed as what is illegal, or unethical or immoral or socially harmful…"*

45. In addition Warby J in Monroe stated:

> *"The criminal law can generally be taken as an expression of society's shared values. As a rule "right-thinking" members of society generally deplore those who commit offences. They also disapprove of those who condone criminality."*

46. Any reference to criminality in the two Tweets would impliedly arise as a result of the reference to "blagging" undertaken by Mr Whittamore constituting alleged criminal breaches of the Data Protection Act 1988. However in the Panel's view the reference to the Claimant in Tweet 1 is no more than he appeared as a "top contact" of Mr Whittamore rather than that the Claimant himself (as opposed to Mr Whittamore) had engaged in "blagging". Having considered the arguments put by both parties the Panel has come to the view that the "natural and ordinary meaning" conveyed by Tweet 1 is not defamatory.

47. In relation to Tweet 2 the Panel has to consider whether the imputations relating to alleged "tabloid trolling" of Leveson witnesses by the Claimant would be deprecated by "right-thinking members of society". Having considered the submissions of both parties and having expressly requested submissions as to what is meant by "tabloid trolling" the Panel adopts the submission of the Publisher that "trolling is disruptive and upsetting, but generally stops short of any kind of unlawful activity." On that basis the Panel finds that "tabloid trolling" would not be regarded as acceptable conduct by "right-thinking" people generally and that it is not acceptable conduct to be undertaken by a reputable journalist. The Panel therefore finds that Tweet 2 has a defamatory tendency.

Serious Harm

48. Even though the Panel has found that Tweet 2 has a defamatory tendency it is not defamatory unless its publication has caused or is likely to cause serious harm to the Claimant's reputation under section 1 Defamation Act 2013. The Claimant must prove as a matter of fact that his reputation has suffered or is likely to suffer serious harm as a result of the publication of Tweet 2.

49. In Sobrinho v Impressa Publishing S.A. (2016) EWHC 66 (QB) Dingemans J noted that "unless serious harm to reputation can be established then injury to feelings alone, however grave, will not be sufficient." It went on to decide that "serious" is an ordinary word in common usage. The burden of proof upon the Claimant is to prove "as a fact, on the balance of probabilities that the statement complained of has caused or probably caused serious harm to the Claimant's reputation…"

50. In Monroe, Warby J. set out a list of factors which he went on to consider in deciding the existence or otherwise "serious harm". These included:-

    i. The extent of publication

    ii. The transience of the publication

    iii. The credibility of the publisher

    iv. Evidence that the allegation was believed

    v. Evidence that "no harm" was done to the reputation of the Claimant

    vi. The reaction to the publication

    vii. The existing standing or reputation of the Claimant in the eyes of the publishes.

    These are only factors which arose in the circumstances of the Monroe case but they are nevertheless helpful in enabling a panel to decide whether or not serious harm was caused to the Claimant's reputation.

51. In his initial allegations of fact the Claimant submits:

    i. The Tweets appeared in Google searches so that any prospective PR client or employer would have seen them.

ii. He refers to Jonathan Hartley Associates (who had seen the Tweets) being unable to appoint the Claimant because they were risk averse. The Claimant adduces at Appendix 11 to his statement of allegation a statement from Mr Hartley in which he sets out why to avoid receiving bad publicity, he was unable to engage the Claimant. He also states that when he spoke to the Claimant in mid March (2017) "he (the Claimant) was shocked and understandably upset and angry about the false allegations".

iii. The Claimant also puts in evidence a statement dated 26 April 2017 by Jonathan Chandler who has known the Claimant since 2006 and has commissioned him in the past for freelance work in media training where he states that:

> "to also falsely state that… he targeted and harassed witnesses to the Leveson Inquiry would in my opinion make employing Mr Rice impossible until this was corrected. These claims have been published on Twitter - where they can be seen by anyone including clients - and have been there for at least a month".

iv. The Claimant submits that in addition there will be "prospective clients and employers who have seen these Tweets and been so shocked and horrified by them that they will not even contact me, let alone employ me. Other than my contacting everyone I have ever worked for to then draw attention to these damaging Tweets I have no way of ascertaining the toll they have taken on my reputation and career…".

v. The Claimant submits that both Tweets should also be considered "in the context of a four year long campaign of abuse and harassment by Peter Jukes the owner of the Publisher. The Claimant summarises this in a chronology exhibited as Appendix 15.

52. The Panel in deciding this matter is not ruling on the communications that have passed or may have passed between the parties over the period of time when there has been a dispute between them, rather its role is to determine the Claimant's complaint in respect of the two Tweets in issue. However, in considering the issue of serious harm, the Panel takes the view that it is entitled to take into account the context that there was undoubtedly a continuing dispute between the parties. Given that the dispute between the parties and the fact that much of this was public (as in the case of Monroe), the Panel does not consider Tweet 2 which it has found has a defamatory tendency has "gravely" affected the Claimant's reputation. Nevertheless, having considered the evidence adduced by the Claimant, it is satisfied that the publication of Tweet 2 has for the purposes of Section 1 Defamation Act 2013 caused "serious harm" to his reputation.

53. A person who proves that they have been libelled is entitled to recover damages sufficient to compensate for the wrong suffered. The approach to be adopted in assessing damages was set out by the Court of Appeal in John -v- MGN Ltd (1997) QB 586.

54. Sir Thomas Bingham MR stated in his judgment:

> *"That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; --- the extent of publication --- a successful plaintiff may properly look to an award of damages to vindicate his reputation --- compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendants conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross examines the plaintiff in a wounding or insulting way."*

55. As was the case in Monroe the Panel finds that the allegations made in Tweet 2 serious but not grave. It has also found that the Tweets were re-Tweeted to a significant number of followers.

56. In exercising its discretion the Panel considers the following factors relevant;

    56.1 Though it has found Tweet 2 to be defamatory in asserting "tabloid trolling", the context refers to a past recollection, "if anyone else remembers" and that "we have new evidence might explain" (sic). This is not an overtly malicious statement.

    56.2 It is not disputed the Claimant has been involved generally in journalistic activity in which allegations of trolling and blagging have occurred. The overall context in which the reference to "tabloid trolling" has been made is, in the Panel's view, based upon the evidence produced both by the Claimant and by the Publisher, such that "blagging" and trolling activity has taken place. As a consequence, injury to the Claimant's professional reputation should be considered in that context.

    56.3 However, the Panel is also mindful, according to the evidence of Mr Hartley and Mr Chandler, that the Claimant has nevertheless suffered material harm.

57. The Panel notes that Warby J in Monroe took the view that the defamation in that case was not "grave" though it was an allegation of vandalising and desecrating a war memorial. In the Panel's view such allegations are significantly more serious than the defamation within Tweet 2. It also takes into account that in his statement of fact the Claimant appears to place greater emphasis on the alleged defamation contained in Tweet 1 i.e. blagging (which is a criminal activity) whereas trolling is generally not.

58. The Panel is assisted by analogy with the award of damages in Monroe where the Judge awarded damages of £8,000 for the second tweet. He also commented that a settlement proposal of £5,000 damages was a "reasonable offer". The Panel has already indicated that the harm suffered in this case was at a level less than that suffered in Monroe. In these circumstances it considers that reasonable compensation for the defamation contained in Tweet 2 would be less than £5,000. It considers an award of damages of £2,500 appropriate and reasonable compensation.

Costs

59. Under Rule 11 the Panel may make an award of costs against the Publisher. The Panel understands that neither party was formally represented. Accordingly the Panel does not consider it appropriate for costs to be awarded.

Other Relief

60. The Claimant has requested an award or direction under Rules 25(c) and (d) that:

    (i) The Publisher shall publish a summary of the Award;

    (ii) The Publisher shall not re-publish the information or statement in respect of which the claim has been brought;

    (iii) Such other award or direction the Panel may determine. The Claimant specifically refers to an apology.

Despite being given an opportunity to respond to this request the Publisher has not done so.

The Panel considers, in all the circumstances, that it should direct that the Publisher shall not republish the information or statement contained in Tweet 2.

Summary of conclusions:

61. The Panel finds:

    61.1 Tweet 1 lacked defamatory tendency and was therefore not defamatory of the Claimant;

    61.2 Tweet 2 for the reasons set out above is defamatory of the Claimant;

    61.3 It considers in all the circumstances that £2,500 is a reasonable figure to compensate the Claimant and awards that sum to the Claimant by way of damages;

    61.4 It directs that the Publisher shall not republish the information or statement contained in Tweet 2.

    61.5 The Panel makes no award of costs.

Clive Duncan Thorne, Arbitrator

6th July 2017