JUDICIARY OF ENGLAND AND WALES

Tuesday 28 February 2023

PRESS SUMMARY

Banks v Cadwalladr

[2023] EWCA Civ 219

Dame Victoria Sharp, President of the King's Bench Division, Lord Justice Singh & Lord Justice Warby

1. The court gives judgment on the claimant's appeal against the dismissal of his claim in libel. The appeal is allowed in part. The main judgment is given by Lord Justice Warby with whom Lord Justice Singh and Dame Victoria Sharp, P, agree.

Background to the appeal

2. The claimant is a businessman who was a leader of the campaign for the UK to leave the EU. The defendant is a freelance journalist and writer. The claimant sued the defendant for libel in a talk ("the TED Talk") and a tweet ("the Tweet") each of which suggested that the claimant had secretly broken the law on electoral funding by taking money from a foreign power and lied about the matter. The TED Talk and the Tweet were published online to a substantial audience in this jurisdiction.

3. By the time of trial official investigations had found no evidence that there had been any such breach of the law. A defence of truth had been abandoned. The defendant had apologised. But she relied on the statutory defence of publication on matters of public interest. The issues in relation to each of the statements complained of were (a) whether the claimant had proved that its publication in England and Wales had caused serious harm to his reputation or was likely to do so; and if so (b) whether the publication was protected by the public interest defence.

4. The trial judge dismissed both claims, holding that although the initial publication of the TED Talk had caused serious harm it was protected by the public interest defence; later publication of the TED Talk was not so protected but publication in this period ("Phase Two") had not caused serious harm and was therefore not actionable; as for the Tweet, its publication would have been protected by the public interest defence to the same extent as the TED Talk but none of it was actionable anyway as it had not caused any serious harm to the claimant's reputation.

The issues on the appeal

5.   The appeal raised three issues about the interpretation and application of section 1(1) of the Defamation Act 2013, which provides that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

6.   The first issue was about the meaning of section 1(1) and its relationship with the public interest defence provided for by section 4(1) of the 2013 Act in a case of continuing publication. Where the defendant has a public interest defence which falls away is the fact that the first, lawful phase of publication caused serious harm to the claimant's reputation enough to justify a judgment for the claimant in respect of the second phase? The claimant argued that it is. The trial judge said that it is not. She held that in such a situation it is necessary for the claimant to prove that that publication *in the second phase* has caused serious harm or is likely to do so.

7.   The second issue was about the judge's approach to the question of whether serious harm was established. The judge found that the harm caused was reduced because most of those to whom the relevant publications were made were (a) in the defendant's "echo chamber" and (b) people whose opinion of the claimant was of "no consequence" to him. The claimant argued that this was wrong in principle or unsupported by the evidence.

8.   The third issue was whether the alleged errors of law undermined the judge's overall conclusions and her decision to dismiss both claims. The claimant argued that they did and that the only conclusion open to the judge on the evidence was that serious reputational harm was established in respect of the relevant publication of the TED Talk and the Tweet.

The court's decision

9.   The court agrees with the judge's decision on the first issue, holding that the effect of section 1(1) of the 2013 Act is that a statement is only to be regarded as defamatory if and to the extent that its publication causes serious harm to reputation or is likely to do so; publication that does not cause serious harm and is not likely to do so is not actionable. The judge was therefore right to consider whether the claimant had proved that publication in Phase Two caused serious harm to his reputation.

10.   The court holds that the judge was right to find that this was not proved in respect of Phase Two publication of the Tweet but concludes that the only decision open to her on the evidence was that Phase Two publication of the TED Talk in this jurisdiction did cause serious harm to the reputation of the claimant.

11.   The allegation was inherently likely to cause serious reputational harm. The TED Talk was extensively published in this jurisdiction in Phase Two. The judge's finding that viewers of the TED Talk were in the defendant's "echo chamber" was not supported by the evidence. Her finding that the harm caused was less because the opinions of these viewers were of "no consequence" to the claimant was wrong in

principle. There was nothing else to act as a counterweight to the natural inference that publication in Phase Two had caused serious harm to the reputation of the claimant.

12.   As the defendant had no public interest defence (nor any other defence) in respect of that period of publication it follows that the claimant is entitled to judgment for damages to be assessed in respect of the publication of the TED Talk in Phase Two.

NOTE: This summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://caselaw.nationalarchives.gov.uk/